JD(NY)-28-11
Farmington, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AMERICAN RED CROSS, BLOOD SERVICES, CONNECTICUT REGION	**Cases 34-CA-12422**
	34-CA-12544
and	**34-CA-12566**
	34-CA-12601
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3145 OF COUNCIL 4	**34-CA-12624**

***Thomas E. Quigley, Esq.*, for the General Counsel**
***J. William Gagne Jr., Esq., (J. William Gagne, Jr. & Associates)*, of West Hartford, CT, for the Charging Party**
***Michael J. Westcott, Esq., (Axley, Brynelson, LLP),* of Madison, WI, for the Respondent**
***Steven W. Suflas, Esq. and Donna D. Page, Esq., (Ballard, Spahr, LLP)*, of Cherry Hill, NJ, for the Respondent**

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in Hartford, CT, and New York, NY on seven days between October 13, 2010 and February 2, 2011.[1] The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, made unilateral changes, refused to provide information to the Union, bargained with a fixed intent to impose its contract proposals, insisted upon proposals that were predictably unacceptable to the Union, failed to cloak its chief bargaining representative with authority and failed to engage in good faith bargaining. The Respondent denies that it has engaged in any unfair labor practices.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the Brief filed by General Counsel and the two Briefs filed by Respondent on

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[1] By agreement of the parties on March 30, 2011, Respondent's Exhibit 144, a January 23, 2009 letter from Richard L. Strouse to Kip Lockhart, is hereby admitted into evidence. Despite the fact that many attachments are mentioned in the letter, only one document is attached, an undated Summary Plan Description of a Benefits Advantage Plan.

[2] In its Brief, Respondent for the first time raises the defense that certain allegations of the Complaint are time barred by Section 10(b). This defense was not presented in Respondent's Answer and was not litigated at trial, and I shall not consider it.

April 4, 2011, I make the following [3]

Findings of Fact

I. Jurisdiction

The Respondent, an unincorporated chartered unit of the American National Red Cross, a Federally chartered corporation, with an office and facility located in Farmington, Connecticut, is engaged in the collection, processing and distribution of blood and related materials. Annually Respondent derives gross revenues in excess of $250,000 and sells and ships from its Farmington facility goods valued in excess of $50,000 directly to points outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, that it is a health care institution within the meaning of Section 2(14) of the Act, and that American Federation of State, County and Municipal Employees, Local 3145 of Council 4, is a labor organization within the meaning of Section 2(5) of the Act.

[3] The record is hereby corrected so that at page 29, line 8, the correct name of the witness is Kip Lockhart; at page 39, line 22, the last word is "comparable"; at page 42, line 4, the phrase should read "that was in place at this time"; at page 53, line 22, the phrase should read "give up our right"; on page 68, line 13, the phrase should read "it had an Employer match"; on page 97, line 2 and thereafter, the meetings were held at Council Four; on page 126, line 14, the correct date is 2010; on page 138, line 7, the sentence begins "We wanted separate costs…."; on page 209, line 11, the phrase should read "substantially comparable"; on page 209, line 24, the phrase should read "wage proposal"; on page 235, line 3 and thereafter, the phrase "shovel diplomacy" should be replaced by "shuttle diplomacy" and on page 1016, line 7 and thereafter, the phrase "subtle diplomacy" should be "shuttle diplomacy"; on page 248, line 25, the phrase is "informational picketing"; at page 269, line 19, the first word is "lawful"; on page 272, lines 10 and 14, "PPO" should be replaced by "EPO"; on page 420, line 23 replace "Yukon" with "UCONN"; on page 431, line 7, replace "information" with "interest"; on page 459, replace "imposed" with "opposed"; on page 545, line 17, the phrase is "to new employees"; on page 649, line 22 "page" should be "pay" and "35" should be "3.5"; on page 668, line 7, "CompFirst" should be "CareFirst"; on page 729, line 7, "change" should be "chair"; on page 757, line 22, and thereafter, the correct spelling of the name is "Rick Strouse"; on page 776, line 17, the first phrase is "stand alone"; at page 786, line 5, the phrase should read "it was the Respondent's view"; page 800, line 24 "recent" should be "recall"; on page 802, line 22, the last phrase is "overrule it"; on page 805, line 11, "interagency" should be replaced by "intransigency"; on page 810, line 21 and thereafter, the correct phrase is "cost itemization" and "cost savings"; on page 819, line 13, "agronomy" should be replaced with "acrimony"; on page 861, line 5, the phrase is "he was in the same"; on page 869, line 23, the phrase is "open issue"; on page 901, line 25, the number is "401(k)"; on page 903, line 18, the last phrase is "Red Cross"; on page 928, line 22, Mr. Suflas moved the document into evidence; on page 948, line 1, replace "hold" with "hole"; on page 976, line 21, the first word is "aren't"; on page 1016, line 7 and thereafter, the phrase is "shuttle diplomacy"; on page 1030, line 17, counsel was "Mr. Suflas"; on page 1045, line 3, the phrase is "non-starter"; throughout the transcript, the name of the Federal Mediator is Joe Dubin, the name of the Union president is Debbie Lenentine and the company that administers health benefits is "Hewitt".

II. Alleged Unfair Labor Practices

A. Background

The American National Red Cross, headquartered in Washington, D.C., has two types of units that provide service to the public: chapters engaging in disaster relief and in community services such as education and training; and regions that provide bio-medical services such as blood, plasma and other blood-related services. Respondent is one of 46 such blood services regions in the US; it serves about 30 acute care hospitals in Connecticut.[4]

Respondent, American Red Cross Blood Services, Connecticut Region, is headed by CEO Paul Sullivan. Sullivan reports to Mary O'Neill, the CEO of the Northeast Division of the American National Red Cross. The National CEO is Gail McGovern; she reports to the Board of Governors of the American National Red Cross.[5]

The main facility of the Connecticut Region is in Farmingdale. There is also a fixed site in Norwalk that collects blood three times per week and conducts blood drives out of the location. The Region employs about 380 employees who are engaged in collecting blood, processing blood and performing special testing on blood for hospitals.

Respondent and the Union have entered into several successive collective-bargaining agreements, the most recent of which was effective by its terms from May 7, 2006 until March 31, 2009, and which was extended until April 26, 2009. The Union is the exclusive collective-bargaining representative of Respondent's employees in an appropriate unit of about 225 employees defined in the 2006-2009 contract as comprising the following titles:

> Reference technologist, component laboratory technician, Q & L technician, Red Cross head nurse, Red Cross assistant head nurse, Red Cross nurse (RN or LPN), blood services nursing technician (BSNT), Red Cross nurse (HAS). Pherisis head nurse, pheresis staff nurse (RN), blood services apheresis technician (BSAT), unit driver-technician, driver-SCU, packer/loader, technician, technician/driver, mechanic, central supply technician; excluding supervisors, pheresis scheduler, students, students training in blood banking, professionals (other than pheresis RN's), and excluding all other employees including all office or clerical employees, guards, professional employees (other than collection department and pheresis non-supervisory RN's), full-time students (e.g. cooperative work students, SBB students, residents in training and non-blood services employees in training).

The Union requested bargaining for a successor to the 2006-2009 collective-bargaining agreement on December 17, 2008. The instant case arises out of the bargaining for the successor agreement.

The first bargaining session took place on February 9, 2009. Respondent's chief negotiators were Rick Strouse, Esq. and Michael J. Westcott, Esq. Attorney Strouse had

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[4] The precise legal parameters of the relationship between the American National Red Cross and the affiliated units were not described in the record.

[5] Sullivan is an admitted supervisor and agent of Respondent. McGovern is an admitted agent of Respondent for purposes of communications sent to employees of Respondent during the time period relevant to the instant case.

negotiated prior agreements on behalf of Respondent, as will be described below. In December 2009 Strouse left his law firm for another position and his partner Steven W. Suflas, Esq. took his place at the negotiating table. The Union's chief spokesperson was Kip Lockhart, a staff representative of AFSCME. Lockhart's role was to assist the local in negotiations. He could make suggestions about the bargaining but the Union's negotiating committee had the ultimate power to accept or reject Lockhart's suggestions. The local's negotiating committee was led by the president and consisted of 11 unit members, each of whom represented a department of the Connecticut Region. Initially, Debbie Lenentine was president of the local; on October 26, 2009 Christine Holschlag was elected to fill that position.

B. A Brief History of the Health and Retirement Benefits

1. Health Benefits

Anna Shearer is the vice-president for human resources of the American National Red Cross, with responsibilities for retirement, health and life insurance benefits, recruiting and other human resource programs. Shearer testified about the history of the health and retirements benefits for employees of the Red Cross entities, including the employees of the Connecticut Region.

For a number of years, employees of the various Red Cross chapters and regions around the country had been covered by a multiplicity of health insurance plans. Each plan was tailored to its respective unit.

Shearer testified that every year the National Red Cross would undertake a review of all insurance plans and costs and send out requests for bids for coverage commencing January 1 of the next year. After reviewing the bids, the National Red Cross would choose the new plans and set the rates. The various Red Cross chapters or regions would review the new plans and rates and would inform the National Red Cross what options and what premium cost sharing arrangements should be offered to their respective employees when they enrolled in next year's plan. Information about the plans and enrollment materials for the next year, prepared by the National Red Cross, would be mailed to each employee's home address in time for the open enrollment period spanning several weeks in October and November of each year.

In 2006 the Board of Governors of the National Red Cross mandated that employees around the country were to be placed in a single insurance scheme in order to reap the economies of scale that would be obtained by shifting employees from the approximately 100 plans that had covered Red Cross employees and their families.[6] Planning for the new insurance plan took over one year for a scheduled enrollment in the fall of 2007.

Immediately prior to January 1, 2008 all employees of the Connecticut Region had been covered by a medical insurance plan named Connecticare and a Delta Dental plan.[7]

As of January 1, 2008, the National Red Cross introduced a comprehensive plan called Benefits Advantage which includes medical, prescription, dental, vision and basic life insurance.

[6] Shearer said there were about 28,000 employees and 22,000 dependents. However, documentary evidence shows there were 23,240 employees.

[7] Both unit and non unit employees of the Connecticut Region are covered by the same insurance plans.

Shearer testified that after employees had enrolled in Benefits Advantage but before the January 1, 2008 effective date, Deloitte Consulting prepared a report comparing the 2007 Connecticut insurance program with the 2008 Benefits Advantage plan. The report compared the 2007 costs for the employer and the employees and projected the 2008 costs, comparing contributions, out of pocket costs, copays and myriad other figures. Respondent did not offer the Deloitte document to show the actual figures, but to show that the process had occurred when Benefits Advantage was instituted.

Benefits Advantage is a self-insured umbrella health and welfare plan. In 2008 it offered employees a choice of three medical plans: a standard PPO (preferred provider organization), a premier PPO and an EPO (exclusive provider organization, similar to an HMO). Also included were prescription, dental, vision, life insurance, disability insurance, EAP and a group legal plan. Hewitt Associates keeps demographic data, determines eligibility, communicates with employees about enrollment options and hosts a website for participants of Benefits Advantage. Third party administrators pay the medical insurance claims: Care First Blue Cross/Blue Shield pays claims for the PPO and EPO medical insurance and MetLife and Aetna pay claims for the dental plan. Life and disability insurance are purchased through MetLife.

Shearer testified that Benefits Advantage was created with the idea that a larger risk pool would permit better cost control and less administrative cost. The fact that Benefits Advantage is self-insured means that the employer pays the exact cost of the medical claims, plus a fee for administration, rather than paying an insurance company to buffer the risk and earn a profit.

The advent of Benefits Advantage in January 2008 meant that for employees of the Connecticut Region the Connecticare medical insurance was discontinued and employees were offered the choice of two PPOs and one EPO. Delta Dental was discontinued and the national dental insurance options were offered to the Connecticut Region employees.

Not all Red Cross employees in the United States who are covered by collective-bargaining agreements were placed into the Benefits Advantage insurance described above. Some collective-bargaining agreements required that employees receive specific coverage by certain Kaiser plans or other regional plans. These are fully insured plans and they are administered under the Benefits Advantage umbrella.

Shearer testified that if required by a collective-bargaining agreement, a separate medical plan could be administered under the benefits Advantage umbrella. She estimated it would cost $100,00 in total to establish the plan “soup to nuts”, including such tasks as designing the plan, finding a network and administrators for the plan, hiring actuaries to price the expected cost, adding the plan to accounting and record keeping facilities, handling billing, conducting an audit, and modifying enrollment materials and an enrollment system.

2. Retirement Benefits

a. The Retirement System

Shearer described the American National Red Cross Retirement System as a defined benefit plan funded solely by employer contributions from participating entities of the American Red Cross.[8]

[8] Most Red Cross entities, including Respondent herein, have chosen to participate in the

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Red Cross Chapters and Regions have no control over the Retirement System; they can only elect to have their employees participate in the System or they can decline to so elect. All employees are treated equally under the System without regard to job title.

Since the inception of the Retirement System in 1936 the Retirement System Rules and Regulations have been amended many times. Shearer testified that amendments are made by action of the Board of Governors of the American National Red Cross.

Some of the amendments to the Retirement System Rules and Regulations were necessary to conform the plan to ERISA and IRS requirements.

Other amendments were made for a variety of other reasons. In the year 2000, amendments to the System were made to increase payments to retirees who receive small benefits, to pay a 2% ad hoc benefit to retirees, and to decrease the employer contribution rate as a percentage of compensation from 2% to 1%. At various times the annual rate of interest credited to the annuity savings account of the Retirement System was changed. In 2003 the employer contribution rate was increased to 2% of compensation, and in 2004 it was again increased to 4.5% of compensation. In 2005 the employer contribution rate was decreased from 4.5% to 4.25% of compensation.

In 2005 the Retirement System was amended to add the requirement of a minimum 1000 hours worked in a 12 month period for eligibility to join the System; this was in addition to the previously required one year of service. The benefit formula for years of service after July 1, 2005 was changed to 1% of average pay; the effect of this amendment was to reduce retirement benefits to employees. The provision relating to the early retirement benefit was changed to require employees to work more years in order to receive unreduced benefits. The automatic 1% increase previously given to retirees was discontinued for service after July 1, 2005. Voluntary (after tax) contributions to the Retirement System were discontinued.

In 2007 the System was amended to name a Benefit Plan Committee appointed by the Board of Governors of the American National Red Cross as the fiduciary of the plan.

In 2009 the System was amended to increase the employer contribution rate to 10.00% of compensation. Chapters were restricted from joining the System after April 1, 2009. Membership was closed to employees hired on or after July 1, 2009 and closed to former employees rehired on or after July 1, 2009 and more than 90 days after their prior termination.

Shearer testified that from time to time after a number of amendments have been enacted, a Retirement System Rules and Regulations restatement is issued incorporating the amendments made since the prior restatement.

The last restatement of the System was issued on July 1, 2005. It provides, in relevant part:

> Section 12.1 (a) Right to Amend. The American National Red Cross reserves the right to amend the System at any time, in whole or in part, including, without limitation, retroactive amendments necessary or advisable to qualify the System and

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System.

Trust under the provisions of Code section 401(a).[9]

Section 12.3 (a) System Termination

> While it is the intention of the American National Red Cross to continue the System in operation indefinitely, the American National Red Cross reserves the right by action of the Board of Governors to terminate the System in whole or in part. All actions undertaken by the Employer to effect the termination of the System shall be in accordance with Title IV of ERISA.

Following the 2005 restatement of the System Rules and Regulations, a summary plan description was sent to the home addresses of all participants, including employees of the Connecticut Region. In addition the summary was posted on the Red Cross intranet (CrossNet) and the summary was posted on the website of the Retirement System.

After the System was amended to close the plan to employees hired on or after July 1, 2009, a summary plan description was mailed to employees describing the System as of December 2009. Continuing the prior practice the summary was posted on the Red Cross intranet and posted on the website of the Retirement System.

The record indicates that the decision to close the Retirement System to newly hired employees was made in December 2008 or in March 2009 at the latest.

b. The Savings Plan 401(k)

Shearer testified that effective January 1, 2000 the American National Red Cross established a defined contribution plan, known as the Savings Plan 401(k). The plan provides for both employee and employer contributions. As with the Retirement System, the Chapters and Regions of the Red Cross have no control over the plan.

Section 7.1, Amendment, of the plan provides in relevant part:

> The American National Red Cross reserves the right to amend the Plan at any time and from time to time, in whole or in part, including, without limitation, retroactive amendments necessary or advisable to qualify the Plan and Trust under the provision of Code section 401(a).

Section 7.2 Termination, Partial Termination, or Complete Discontinuance of Contributions, provides in relevant part:

> Although the Employer has established the Plan with the intention and expectation that it will make contributions indefinitely, nevertheless the Employer shall not be under any obligation or liability to continue its contributions or to maintain the Plan for any given length of time. The Employer may in its sole and absolute discretion discontinue contributions or terminate the Plan in whole or in part in accordance with its provisions at any time without any liability for the discontinuance or termination.

The Savings Plan was amended in 2001, 2002, 2003 and 2005 for the purpose of making technical language changes to clarify definitions, to conform to the IRS Code and to

[9] Under the IRS Code a 401(a) plan is a defined benefit pension plan.

permit special employer contributions for low paid employees.

In 2005 the plan was amended to change the employee contribution level and to increase matching employer contributions from 50% of the first 4% of employee contributions to 100% of the 4% employee contribution. The immediate vesting of employer contributions was changed to a three-year vesting schedule for employees hired on or after July 1, 2005. A loan provision was added in addition to the hardship withdrawal provision. The Savings Plan was restated on July 1, 2005 to incorporate the amendments and a summary plan description was furnished to employees at that time.

The Savings Plan was further amended in 2008 to allow catch up contributions, to make technical language changes, and to establish an administrator appointed by the Board of Governors of the American National Red Cross. Other amendments in 2008 confirmed the plan to Federal legislation and clarified vesting rules at retirement age.

On April 30, 2009 the American National Red Cross amended the Savings Plan to discontinue employer contributions effective May 1, 2009 and to provide for the reinstatement of matching employer contributions in the discretion of the American National Red Cross and at a percentage of employee compensation to be determined by the American National Red Cross. The matching 401(k) contributions were discontinued in order to deal with shortfalls in the national budget. Shearer testified that these changes were made as a result of the budget process of the American National Red Cross. She said that the various Red Cross regions have no control over the 401(k). Shearer stated that the Connecticut Region had no input into the decision to discontinue employer contributions.

The record does not disclose why or in what manner the budget problems of the National Red Cross would be aided by the cessation of contributions on the part of the Respondent Connecticut Region. Indeed, there is no evidence concerning any financial arrangements between the Respondent and the National Red Cross.

As of the instant hearing, the employer matching contributions had not been reinstated.

C. Financial Issues

Unit employees of the Connecticut Region testified that during the time relevant to the instant case they been told that the Region was meeting its goals.

Respondent presented testimony concerning financial problems at the National organization. Connecticut Region CEO Sullivan stated that for the fiscal year July 1, 2007 to June 30, 2008, the National Red Cross projected a budget deficit of $200,000,000. A January 2008 announcement about National Headquarters restructuring stated that about 1000 employees would be laid off. Sullivan recalled that these layoffs were mostly from the Washington, D.C. office. The 2008 announcement referred to recently introduced programs and services that were no longer sustainable and the need for a new business model. Sullivan testified that the National Red Cross deficit for fiscal year July 1, 2008 to June 30, 2009 was $50,000,000. I note that no audited statements were entered into the record and I rely on Sullivan's testimony for the sole purpose of showing what employees were being told about the financial condition of the National organization. Throughout 2008 and 2009 various memoranda and talking points were distributed to employees to inform them of cost cutting measures initiated by the National organization.

Sullivan testified generally about the economic climate affecting the Connecticut Region.

He said there was lower demand for blood services because of a lower utilization of hospital services. Fewer beds were filled and hospitals did not want to pay at the previous level for the Region's services. There was competition from out of state suppliers of blood. Some hospitals decided to collect their own blood supplies. The Connecticut Region lowered its prices to some area hospitals in order to prevent the hospitals from finding other sources of blood.

Sullivan did not provide any figures or comparative percentages to illustrate the financial condition of Respondent. He did not say that revenue had declined from year to year. Sullivan did not say that net revenue and profits for the Connecticut Region had declined from year to year. Sullivan did not say that the Connecticut Region could not meet its obligations. At trial, Respondent confirmed that it did not raise inability to pay during the negotiations with the Union.

With respect to the Retirement System, Sullivan testified that for fiscal year 2010, beginning July 1, 2009, a total national contribution of $50,000,000 was due. The Connecticut Region had to increase its contribution to the Pension Plan from 4% of payroll to 10% of payroll. This required an increase of $600,000 for the fiscal year. The contribution was made on behalf of all the Region's employees, not just unit members. The record does not disclose what portion of the figure was attributable to unit employees. Sullivan did not disclose what proportion of the Connecticut Region's yearly budget was represented by the figure he named.

On April 2, 2009, National President McGovern sent a message to all Red Cross headquarters, region and chapter employees detailing various cost-cutting actions. The portions of the message relevant to the instant case provided that as of May 2009 employer contributions to the 401(k) would be suspended, the Pension Plan would close to new employees on July 1, 2009 and there would be upcoming changes in health insurance plans.[10]

Connecticut CEO Sullivan testified that the Board of Governors of the American National Red Cross did not seek his input before approving the changes to the Retirement System and the Savings 401(k) plan. President McGovern did not seek Sullivan's input before sending her memorandum to employees about these changes and the upcoming changes in health insurance plans. Sullivan testified that he "sets the bargaining strategy" for the Connecticut Region.

D. A Short Bargaining History

In the two sets of negotiations prior to 2009 the employer's goals had been to reduce the costs imposed by the collective-bargaining agreement for items such as wage rates, insurance benefits, costs associated with premium pay for scheduling and compensation for non-work time. The Union wanted to maintain current benefits and it viewed the employer's efforts as "take aways."

1. April 1, 2000 to March 31, 2003 Collective-Bargaining Agreement

The April 1, 2000 to March 31, 2003 contract stated that for the "duration of this agreement" the employer would pay the "following percentages of the cost of the following health insurance plans, or the equivalent of such plans as determined by the employer."

[10] This memo is quoted in detail below.

Delta Dental,

100% for full-time employees and dependents as of 6/00, 95% as of 4/02
60% for part-time employees and dependents as of 6/00, 57% as of 4/02

Managed Care Programs including HMO, PPO, POS options with plan design and benefits effective 4/01/00,

87% for full-time employees and dependents as of 4/00, 85% as of 4/02
52.2% for part-time employees as of 4/00, 51% as of 4/02

2. Negotiations for May 1, 2003 to March 31, 2006 Agreement

Strouse testified that the employer's goals in the negotiations for the 2003 to 2006 contract included changing the language which obliged the employer to pay a percentage of the cost of the current health insurance plans "or the equivalent of the plans, as determined by the employer." The new language proposed by the employer would have stated, "The Region will provide the same health, dental, life and long-term disability benefits for employees and their dependents, under the same conditions, for as long and with the same employee contributions as for non-represented employees." Strouse characterized this as a "complete me-too" proposal. The Union rejected the me-too approach. The Union wanted to maintain the current language and change the co-pays. During the ensuing negotiations the company abandoned the me-too concept and it offered to agree that the health insurance plan would be "substantially comparable" to the current plans as determined by the employer.

After negotiations lasting from March to May, 2003, the parties settled on the following language:

Section 14.0 For the duration of this Agreement, the Employer shall pay the full cost of the present group life insurance plan or a substantially comparable plan for full-time and part-time employees, and shall the pay the following percentages of the cost of the following health insurance plans, or substantially comparable plans as determined by the Employer.

	Full-time employees and enrolled dependents	Part-time Employees
Delta Dental	95%-4/03	65%-4/03
Managed Care Programs	85%-4/03	65%-4/03
Including HMO, PPO,	82%-7/03	60%-7-03
POS options with plan	81%-7/04	55%-7/04
Design and benefits	80%-7-05	50%-7/05
Effective 01/01/03		

Coverage shall commence in accordance with the terms of the respective contracts. In the event that any of the current insurance plans no longer are offered or are available by the insurance carrier, the parties agree to meet and negotiate concerning an acceptable replacement plan.

Strouse said the "substantially comparable" standard was less stringent than the old "equivalent" standard. The employer gave up its quest for the me-too language in return for the

application of a more flexible standard in evaluating changes to the health plan. Grievances about whether a benefit plan was substantially comparable would be brought at the second stage of the grievance procedure. The employer was also required to provide long term disability insurance.

The 2000-2003 collective bargaining agreement had required the employer to pay the full cost of the Retirement System and this language was continued in the 2003-2006 collective-bargaining agreement. In the 2003 negotiations, the parties added language providing for a 401(k). The 401(k) Savings Plan had been established in the year 2000 by the Board of Governors of the American National Red Cross but had not been previously offered to unit employees of the Respondent. In 2003, the terms of the 401(k) required the employer to match 50% of employee contributions up to 4% of the employee's salary.

Article XV – Pension and 401(k) Savings Plan of the 2003-2006 contract provided:

> Section 15.0. The Employer shall continue to pay the full pension cost of the Retirement System of the American National Red Cross.
>
> Section 15.1. Part-time employees shall be eligible to participate in the Retirement System of the American National Red Cross in accordance with its terms.
>
> Section 15.2. Employees shall continue to be permitted to make voluntary contributions towards the purchase of a retirement annuity.
>
> Section 15.3. The National 401(k) Savings Plan will be offered to employees on the same basis as it is offered to hourly non-represented employees.

3. Negotiations for the 2006 to 2009 Agreement

In the negotiations for a 2006 to 2009 contract, the employer had the same aims as previously. Strouse testified that the employer wanted more flexibility to change health benefit plans and reap the efficiencies of increased buying power. There was a National Red Cross health plan in existence but the Connecticut Region health plan was a local plan. Strouse again sought to get a me-too provision.

In February 2006 the employer proposed changing Article XIV – Insurance with the following language:

> The Region will provide the same health, dental, life and long-term disability benefits for employees and their dependents, under the same conditions, for as long and with the same employee contributions as for non-represented employees of the Region. It is understood that the Region may change group insurance providers during the life of this Agreement. All disputes between the Region and the Union or employee(s) shall be in accordance with the terms and procedures specified in the applicable group insurance plan or applicable law. No dispute with regard to any plan shall be subject to the grievance or arbitration process provided in this Agreement.

According to Strouse, the Union told him this language would be extremely difficult to accept; it did not want to give up the right to negotiate over health benefits. The Union did not want to give the employer *carte blanche* for changes in health insurance.

The employer proposed changing Article XV – Pension and 401(k) Savings Plan as follows:[11]

> The bargaining unit employees will continue to participate in the American National Red Cross Retirement System, as amended from time to time at the sole discretion of the American National Red Cross. The parties agree that any changes or amendments to the plan automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. The Region, the Union and the employees are bound by the terms of the plan and issues regarding the plan shall not be subject to the grievance or arbitration provisions.

The Union sought language requiring the employer to negotiate an alternative pension system if the Retirement System was eliminated or changed to provide lower benefits.

The parties agreed to delete the provision in former Section 15.2 relating to voluntary contributions towards the purchase of a retirement annuity. As noted above, the Retirement System had been amended in 2005 to discontinue voluntary contributions.

4. Provisions of the May 7, 2006 to March 31, 2009 Collective-Bargaining Agreement

After negotiations the parties agreed on the following language for the May 7, 2006 to March 31, 2009 collective-bargaining agreement. (The collective-bargaining agreement was entered into evidence as GC Exhibit #2. Respondent's Brief on this subject does not quote from the document in evidence. Instead, Respondent's Brief includes different language.)

ARTICLE XIV – INSURANCE

> Section 14.0. For the duration of this Agreement, the Employer shall pay the full cost of the present group life insurance plan or a substantially comparable plan for full-time and part-time employees.
>
> Section 14.1. The Employer shall also provide the same long term disability insurance coverage which is currently provided, or substantially comparable coverage, and any sick leave which a bargaining unit employee may have remaining at the end of the customary waiting period for disability benefits shall be held in escrow by the Employer until the employee returns to work.
>
> Section 14.2. For the duration of this Agreement, the Employer will provide health and dental benefits plans for employees and their dependants in accordance with the terms of the respective contracts, or substantially comparable plans as determined by the Employer. It is understood that the Employer may change group insurance providers during the life of this Agreement. The Employer shall pay not less than the following percentages of the cost of the benefits:

	Full-time Employees and Enrolled dependents	Part-time Employees
Dental	95%	65%
Health	80%	50%

[11] No change was proposed to the 401(k) Savings Plan language.

Coverage shall commence in accordance with the terms of the respective contracts. In the event that any of the current insurance plans no longer are offered or are available by the insurance carrier, the parties agree to meet and negotiate concerning an acceptable replacement plan.

Section 14.3. Any grievance about whether a benefit plan is substantially comparable can be filed at the second step.

Section 14.4. The employer shall implement an IRS Section 125 Plan in order to allow employee contributions to health insurance premiums and certain other qualified expenses to be made on a pre-tax basis.

Section 14.5. For employees who retire after becoming eligible for a pension under the retirement system of the American National Red Cross, the Employer shall provide the following monthly subsidy toward the cost of maintaining membership in any available health insurance plan:

At age 62 with at least 20 years of service; $24 (employee), $48 (employee and spouse)
At age 65; up to $25 (but not more than necessary to eliminate employee cost)

ARTICLE XV – PENSION AND 401(k) SAVINGS PLAN

Section 15.0. Full-time and part-time bargaining unit employees will continue to participate in the American National Red Cross Retirement System, as amended from time to time at the sole discretion of the American National Red Cross, without employees contributing to the cost. The parties agree that any changes or amendments to the plan automatically apply to bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. The Employer, the Union and the employees are bound by the terms of the plan.

Section 15.1. If the American National Red Cross eliminates the American National Red Cross Retirement System, the Employer shall meet with the Union for the purpose of negotiating an alternative Pension system.

Section 15.2. The National 401(k) Savings Plan will be offered to employees on the same basis as it is offered to hourly non-represented employees.

E. The 2009-2010 Negotiations

Negotiations for a successor to the 2006-2009 agreement began when Lockhart sent management a December 17, 2008 formal demand for negotiations and request for information. Lockhart's letter elicited a response from Strouse on December 22 asking the Union to set a date and stating that the requested information was being gathered. Lockhart and Strouse had been the chief Union and employer spokespersons, respectively, during negotiations for the 2003-2006 contract and the expiring 2006-2009 contract.

In 2009 Strouse was the chief negotiator representing several Red Cross Regions: the Buffalo Region, the Connecticut Region, the Greater Chesapeake and Potomac Region and the Penn Jersey Region. Strouse was in contact with the National Red Cross to obtain answers to Union information requests and in frequent contact to share information about the other Regions.

The Union's 2008 request for information covered documents showing employee information, rates of pay, medical and other insurance coverage including premium payments by employees and the employer, and pension and 401(k) coverage. There is no dispute that this information was supplied by the employer. Included in the information Lockhart received were benefit plan documents for the Retirement System, the 401(k) Savings Plan and the various health insurance plans. Lockhart had requested and received the same type of information in previous negotiations with the employer.

I note that the parties' collective-bargaining agreements have contained a no-strike clause and that neither party proposed removing this provision from any successor agreement reached in the current negotiations.

1. First session, February 9, 2009

The first negotiation session was held on February 9, 2009. The parties agreed that there would be no side bars and that all agreements were tentative until the overall collective-bargaining agreement had been concluded. The Union presented its proposals. Lockhart explained that because the Union had made concessions in the last round of bargaining, the Union's demands in 2009 had been formulated to maintain all current benefits.

Some changes demanded by the Union included a wage increase, an eight-hour work day for computing various benefits, an extra holiday and various changes in staffing and administrative practices.

For purposes of the instant case the most significant Union demand included changing the language of Section 14.2 to provide that "substantially comparable" medical plans would be determined by the employer "and the Union." The Union did not offer a specific medical insurance plan at this time, but its written proposal stated, "The Union will propose a new medical plan." Lockhart testified that in 2008 when employees had been placed in the new Benefits Advantage medical plan the Union had filed a grievance alleging that the new plan was not comparable to the old plan. The grievance was not pursued to arbitration because the Union determined, after discussions with its insurance consultant, that it would be difficult to prove the new plan was not comparable to the old plan. Now the Union had two goals: it wanted to propose a new medical plan and if there were changes during the life of the contract it wished to ensure that it would participate in deciding whether a new plan was "substantially comparable."

The Union made no proposal relating to the Retirement System or the 401(k) Savings Plan.

The employer presented its contract proposals at this session. It sought a decrease in paid holidays, a wage freeze, changes in staffing requirements and other changes in the existing contract. With respect to medical insurance the employer wished to replace Article 14 with the following:

> Bargaining unit employees are eligible to participate in the same group insurance benefit plans, under the same terms and conditions, as offered to the Employer's non-bargaining unit employees. It is understood that the Region may change group insurance providers or self-insure such benefits during the life of this Agreement. Any changes or amendments to the plan(s) automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-

bargaining unit employees. The parties further agree that the costs of the coverage under the plans that is charged to bargaining unit employees will be on the same basis as the costs charged to non-bargaining unit employees for the same coverage. The Employer, the Union and the employees are bound by the terms of the plans and issues regarding the plans shall not be subject to the grievance or arbitration process provided in this Agreement.

The Union viewed the "me-too" language of this provision as requiring that it give up the right to negotiate medical insurance for unit employees and requiring that it give up the right to grieve changes in medical coverage. The employer proposal would not require that any new plan be comparable to the medical plan it replaced.

Lockhart testified that Strouse said that he was asking for a three year wage freeze based of the financial difficulties of the National Red Cross. He said it was important to get all employees in the same medical insurance plan. However, Strouse stated that he was not claiming inability to pay on the part of the employer.

Strouse testified that his goals in the negotiations included moving employee benefits to a complete "me-too" status: all the employees in the Connecticut Region would participate in the same plans and the plans could change during the term of the collective-bargaining agreement. Strouse added that he wanted to negotiate fair wages, eliminate excess time off and reduce costs for the employer.

At the February 9 session, Strouse told the Union the National Red Cross was facing a $209 million deficit and that the new CEO of the National organization was committed to reducing the deficit. Strouse said that the Connecticut Region was facing competition from other organizations and had lost some customers. Finally, he said the Region had to pay double the rate of its prior contributions to the Pension System due to ERISA requirements. This amounted to close to 10% of payroll.

Strouse testified that he knew the employer proposal for a "me-too" medical benefits provision would be resisted very strongly by the Union; however, he did not think it was totally unacceptable to the Union. Strouse had made similar proposals in other bargaining units in the Red Cross system and in other places and the language had been accepted. Strouse noted that he had sought essentially the same "me-too" insurance language in the 2003 and 2006 negotiations. In 2006 he had proposed language removing medical insurance issues from the grievance process and leaving any changes in the plan within the discretion of the National Red Cross. Strouse described Lockhart's reaction to the employer's initial proposals for 2009: Lockhart repeated what he had said in the prior negotiations about me-too language and said it would be "extremely difficult for the Union to agree to such proposals and if the Region persisted, that it would be very difficult to come to a contract."

2. February 13, 2009 Request for Information

On February 13, 2009 Lockhart forwarded to Strouse a further request for information consisting of questions formulated by Carol Levarek, the Union's medical insurance consultant. The Union asked for the renewal rates for 2008 and 2009. The Union also requested a large claim report, a medical and prescription drug utilization report and a monthly claim report for Connecticut employees. Levarek wanted the Connecticut utilization and claims experience information so that she could prepare a request for proposals and obtain bids for a different insurance plan for the unit employees.

Strouse testified that he asked management for the information requested by Levarek and he received an e mail from the National Red Cross benefits department stating:

> I have nothing that separates out the Connecticut employees. I would have to pull data from Hewitt to identify them in a file to give to the carriers to then pull the claims for those identified members and then aggregate them to protect the HIPAA information. I'm sure given the effort involved it would be at least five figures and the turnaround wouldn't be quick.

On February 20 Strouse sent an email to Lockhart stating, in relevant part:

> I think you previously were given the renewal rates for 2008 and 2009 for the medical plans. … The rest of the information is not available. We are told that because BenefitsAdvantage is a national plan and rates are set on the whole Red Cross Group nationally that claims are not tracked by unit. Thus, there are no large claim reports, medical and prescription drug utilization reports or monthly claim reports for the bargaining unit or even for the Connecticut Region as a whole. Sorry. Let me know if you want to discuss further.

I note that Strouse's email did not inform Lockhart that in fact there was a method for obtaining the information although it might be time consuming and expensive.

3. Second Session, February 22, 2009

On February 22, 2009 Lockhart gave his reply to the employer's proposals. Lockhart pointed out that the proposals were not based on ability to pay. He said that the Region had added 10 new positions in the last three years and the annual report stated that the Region was meeting goals. Lockhart said that there were many concessions being demanded of the Union in both economic and quality of life areas. As to the changes being proposed to Article 14, insurance, Lockhart told Strouse that this could be a "deal breaker" because the Union would find it very difficult to give up its right to bargain over the plan design and premium cost sharing. In fact, under the employer's proposed language there might be no medical insurance at all offered to employees. Lockhart told Strouse that the Union thought nine of the employer's proposals were reasonable and it would consider them.

Lockhart recalled that Strouse replied point by point to all of the Union's initial proposals. Strouse told the Union to look at the employer's health care proposal and he emphasized that the Red Cross must have everyone on the same benefit plan.

There was no discussion of the Retirement Plan at this meeting.

4. Third Session, March 8, 2009

The Union made its first wage proposal on March 8, 2009. It sought a 5% per year increase for the three years of the contract. Lockhart testified that the Union believed management employees had received a comparable increase. The Union also proposed to raise from 1% to 3% the step increase received each year by employees not at the maximum rate for their title.

Strouse again went over the Union's initial contract proposals and the employer's initial proposals. He castigated the Union for being unwilling to discuss concessions demanded by the Region. The Union caucused and responded. The parties reached tentative agreement on

some issues, agreed to seek information or consider other proposals, and agreed to hold some proposals for further discussion.

There was no discussion of the Retirement System at this meeting.

5. Fourth Session, March 22, 2009

Union insurance consultant Levarek attended the March 22, 2009 session.

Before describing her participation in the negotiations, Levarek testified generally about the difference between a fully insured plan and a self-insured plan. A fully insured plan is issued by an independent insurance carrier which bears the risks associated with coverage. The employer and the employees pay their respective shares of the premiums to the insurance company. If a fully-insured plan were issued in Connecticut, it would meet certain mandates established by the State as to level of benefits and administration. In contrast, in a self-insured plan the employer bears the risk and is responsible for paying the claims. The plan is designed with the intent to bring in enough money to cover the costs of the claims to be paid by the employer plus fixed costs. A self-insured employer does not pay premiums to a carrier, but it pays the costs of an administrator for the plan. The administrator receives and evaluates the claims and it forwards the claims to the employer for payment. An alternative method is for the administrator itself to pay the claims from a sum of money appropriated by the employer. A self-insured plan would not be subject to Connecticut State mandates.

Levarek recalled that she has been providing consulting services to the Union for about six years. Levarek testified that during the first year of the 2006-2009 collective-bargaining agreement the employees were covered by a fully insured medical insurance plan called Connecticare. During the life of the agreement, the employer switched the employees to Benefits Advantage, a self-insured plan that is not subject to State mandates. To prepare for the 2009 negotiations, Levarek asked for certain information and Lockhart sought the data from the employer. Levarek wanted the information so that she could prepare an RFP to obtain bids from Connecticut insurance carriers. The bids would form the basis for the Union's demand for a new insurance plan. As detailed above, the Union received information about the current insurance plans and employee cost sharing but Levarek did not get all the information she asked for; the employer told Lockhart that the additional information consisting of large claim reports, medical and prescription drug utilization reports or monthly claim reports for unit employees and for all Connecticut Region employees was not available.

Using the information that had been provided to the Union Levarek obtained a proposal for a plan called Anthem Blue Cross Blue Shield with medical, prescription, dental and vision coverage. At the March 22 session, the Union presented the Anthem proposal to the employer and the parties discussed its provisions.

At the March 22 session, Levarek asked for more information about the current plan usage. There was general discussion of the insurance issue and Levarek expressed her preference for an insurance plan that would be generated in Connecticut and would meet Connecticut State mandates.

Lockhart told the employer that the Union wanted a fully insured plan purchased from a carrier. The Union wanted contract language that guaranteed future plans would be "equal to or better" than the Anthem plan including the benefits, administration and provider of the insurance.

Strouse replied that the employer's medical proposal was to have all Regions on the same plan. Strouse testified that the employer calculated the Anthem plan would be 20% to 25% costlier than the current Benefits Advantage plan.

Following discussion of the medical insurance issue, the parties discussed other issues.

6. Fifth Session, March 29 and Sixth Session March 30, 2009

On March 29, 2009 Respondent handed out a list of tentative agreements reached by the parties and gave the Union new contract proposals. These proposals dealt with a variety of issues such as holidays, vacation and sick leave, hours of work and other miscellaneous topics. As before, there was no proposal related to Article XV, Pension and Savings 401(k) Plan.

With respect to Article XIV, Insurance, the employer's new proposal would replace Article 14 with the following:

> Effective January 1, 2010 bargaining unit employees are eligible to participate in the same group insurance benefits plans, under the same terms and conditions and with the same premium contributions, as offered to the Employer's non-bargaining unit employees. It is understood that the Region may change group insurance providers or self-insure such benefits during the life of this Agreement. Any changes or amendments to the plan(s) automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. The parties further agree that the costs of the coverage under the plans that is charged to bargaining unit employees will be on the same basis as the costs charged to non-bargaining unit employees for the same coverage. The Employer, the Union and the employees are bound by the terms of the plans and issues regarding the plans shall not be subject to the grievance or arbitration process provided in the Agreement.

This language was a change from the employer's prior proposal in that the provision was made effective January 1, 2010 instead of April 1, 2009, and the "same premium contributions" were now specified.

The Union asked what total savings would be achieved by the employer's economic proposals but Strouse said he did not know. Strouse again referred to layoffs that had been effected by the National Red Cross, he mentioned the $200 million deficit, he said contributions around the country were down and he mentioned increased pension contributions. Lockhart remarked that these problems were national and not specific to the Connecticut Region. Lockhart asked whether the Region had the ability to pay and Strouse responded, as he had in previous sessions, that the employer did not base its proposals on lack of ability to pay.

Strouse told the Union that the Anthem plan it had proposed represented a 30% increase in cost per month over the employer plan for the next year. Strouse's notes show that Lockhart disputed this figure; he said it was only a 13% increase.

At the March 30 bargaining session the Union replied to the employer's proposals of the day before. The parties each withdrew some of their earlier demands and modified others.

Also at this session, the employer and the Union agreed to a formal extension of the collective-bargaining agreement to April 26, 2009. The employer stated it was not willing to extend the contract into May.

7. Announcements from the American National Red Cross

On April 2, 2009 National CEO McGovern sent an email to all Red Cross employees, including the unit employees of the Connecticut Region. The memo spoke of the falling value of the American Red Cross investments and endowment, increasing pension liabilities, and forecasts for declining contributions and softening demand for blood in the coming year. The memo announced various cost-cutting actions approved by the National Board of Governors. The actions that had a direct impact on the bargaining unit were described by McGovern as follows:

> Suspending 401(k) Match -- Starting with the first paycheck of May, we will be suspending the Red Cross matching contribution to the Savings Plan 401(k). We anticipate and hope that this suspension will only be for FY10 … and will let you know if this changes.
>
> Closing Pension Plan to New Employees on July 1 -- Effective July 1, 2009, we will be closing our pension plan to new employees. Employees who join Red Cross units currently participating in the Savings Plan 401(k) on or after July 1, 2009, will be offered an enhanced 401(k) program but will not be eligible to participate in the Retirement System.
>
> Upcoming changes in Health Insurance Plans -- In the months ahead, we will be looking for additional ways to reduce benefit costs….

Following this communication, another memo was distributed to the staff in the form of frequently asked questions. Employees were told that changes in health insurance would go into effect January 1, 2010. The actual changes were not specified at this time.

Edward Kelly, a Red Cross labor relations analyst, sent Lockhart an email about these changes on April 15, 2009. Lockhart testified that this was the first notice to the Union (after circulation of McGovern's memo to unit employees), about the changes to the Pension, 401(k) and health insurance.

The parties stipulated that the employer suspended its matching contributions to the employees' 401(k) savings Plan during the second week of May, 2009. The Retirement System was closed to new employees on July 1, 2009. Individuals have been hired into the bargaining unit after July 1, 2009.

8. Seventh Session, April 19, 2009

On April 19, 2009 the employer gave the Union a new proposal. Among other changes, the employer proposed the following insurance language:

> Effective January 1, 2010, bargaining unit employees are eligible to participate in the same group medical, dental, vision, long-term disability, EAP and life insurance benefits plans, under the same terms and conditions, the same costs of the coverage under the plans and with the same premium contributions as offered to the Employer's non-bargaining unit employees. It is understood that the Region may change group insurance providers or self-insure such benefits during the life of this Agreement. Any changes or amendments to the plan(s) automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. The Employer, the Union and the employees are bound by

the terms of the plans and issues regarding the plans shall not be subject to the grievance or arbitration process provided in this Agreement.[12]

The employer did not make any bargaining proposal related to the Pension or 401(k).

The Union revised its wage proposal to annual increases of 3/5%, 4% and 4%, with a step increase of 2%. This was a reduction from the wage increases the Union had sought in March.

Lockhart testified that the Union did not question the employer representatives about the McGovern memo at this meeting. He had just received a copy and the Union had not yet formulated a response.

9. Eighth Session, April 26, 2009

Union consultant Levarek attended the bargaining session on April 26, 2009. Federal Mediator Joe Dubin joined the parties for the first time. The parties exchanged proposals and counterproposals on a number of issues. From this time forward, many of the parties' communications at negotiation sessions were made through the mediator. Sometimes, in a single session, the parties spoke both through the mediator and face to face at the table.

The Union reiterated its demand on insurance. It wanted a fully insured medical plan that conformed to Connecticut mandates, a plan that was equal to or better than the plan that had been in effect prior to the 2008 switch to Benefits Advantage. Strouse rejected the Union demand. Strouse said the parties were at impasse on the insurance issue because the Union wanted a fully insured plan subject to State mandates but the employer was committed to having all the Connecticut Region employees in the same plan. Further, the employer wished to retain the ability to change the plan in response to increased costs.[13] Strouse acknowledged that the 2010 medical insurance plan had not yet been designed as of this date and the amount of the employee share of the cost had not been determined. Thus, Strouse was asking the Union to agree to a plan about which it knew nothing as to coverage, benefits, co-pays or cost-sharing. And Strouse was asserting that the parties were at impasse because the Union would not agree to the unknown plan.

Lockhart asked Strouse whether it was true that the Retirement System would be closed to new employees. He asked what was meant by the enhanced 401(k) plan mentioned in McGovern's memo and how it met IRS regulations. Lockhart said he needed this information to bargain effectively. Mediator Dubin furnished the response: New employees would not be in the Retirement System. The enhanced 401(k) plan had not yet been determined and the employer would look into the IRS issue.[14] Lockhart was informed that there was no immediate change to the medical insurance but that future changes would be made based on business needs.

The Union asked for certain information. It requested the Retirement System

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[12] The intent of the language was the same as in the employer's prior offer. However, the new proposal listed the specific type of group insurance benefits that might be provided to the unit-employees if management decided to provide them to all other employees, and the new proposal rearranged some of the language.

[13] Strouse also testified that the impasse was broken in further bargaining.

[14] Strouse did not know what the enhanced 401(k) would look like.

documents. The Union asked for the cost of insurance claims for 2007-2009, broken down for medical, prescription, dental and vision, broken down by state. It asked for stop loss insurance figures, a list of large claims and the number of contracts by state and by plan for individuals and family.[15] The Union asked for rates for each state and benefit plan, premiums by state, and any calculation of rates supplied by Hewitt.

Mediator Dubin informed Lockhart that the employer believed impasse existed on the medical issue. Lockhart did not believe the parties were at impasse; the Union needed more information and it was prepared to make counterproposals on the medical issues but it had not yet seen the details of the employer's medical insurance plan for the new contract period.

There was no agreement on another extension of the collective-bargaining agreement.

The parties discussed scheduling issues. For purposes of this decision, it is not necessary to go into these issues at length. Suffice it to say that the Union had a large negotiating committee with conflicting work schedules. Employees on the committee did not wish to meet if they were going to lose pay as a result. The Union often wanted to meet on Sunday. Strouse was not available to meet on any Sundays in May.

10. May 2009

On May 7, 2009 the employer furnished some information to the Union. Strouse explained the enhanced 401(k) benefit referred to in McGovern's email:

> The enhanced 401(k) benefit that will be in place for employees hired by the Region on or after July 1, 2009 will include an annual American Red Cross contribution of 2% of compensation so long as the employee works 1,000 or more hours in the fiscal year and is employed at the Region on June 30th of the fiscal year. No employee contribution will be required to made, (sic), though they may be made on a voluntary basis.

Strouse did not provide any information about changes to Benefits Advantage insurance effective January 1, 2010. He said he expected changes to be decided by the fall of 2009 and he promised to provide the information when the "Region became aware" of the decision.

Strouse gave the Union the plan documents for the Retirement System.

As to the information requested by Levarek, Strouse wrote that the Region did not have the information requested. Strouse stated that the requests were overly broad and unduly burdensome and were not made in good faith and not relevant to the collective bargaining process. Strouse said the parties had already negotiated on health benefits. Strouse asked the Union to explain the reason for the information requests and to narrow the requests.

On May 29, 2009 Strouse informed Lockhart that changes to Benefits Advantage and premium charges would be final by the end of June and he promised to provide that information when it was available. Strouse provided more insurance information in response to the April 26, 2009 request. He said there was no stop loss to report, the rates for Benefit Advantage were the same nationwide and there were no premiums to report as the plan was self-insured. Strouse said he was trying to obtain more information in response to the Union's request.

[15] Stop loss is issued by an insurer to create a maximum liability for the employer. Claims above the stop loss figure roll over to the stop loss insurer.

11. Union Coalition Letter to McGovern

On May 15, 2009 the representatives of a number of local unions that bargain with various Red Cross regions and chapters addressed a letter to McGovern. The letter noted that the Red Cross had demanded concessions from union negotiators but had not alleged inability to pay. The letter stated that Red Cross corporate executives earned large salaries and bonuses. The letter alleged that the Red Cross was engaged in surface bargaining in an attempt to bust its unions and had demanded that the unions give up the right to bargain over mandatory subjects such as health care. The letter went on to say:

> Each of our 9 Regions has been informed that we're dealing with the National American Red Cross, not our American Red Cross Regions. This has led the union locals in each of these Regions to form a national coalition and now the American Red Cross will be dealing with us collectively. … Our Regions request a meeting with you on 5/29 in Washington D.C. at National Headquarters to discuss these matters further.

The letter was signed by Lockhart followed by the names of union representatives from eight other locals who styled themselves as "Coalition staff representatives" of the bargaining unit negotiating teams. Lockhart testified that the coalition was not a formal structure but that it wanted to apply pressure on the Red Cross. The local unions talked about coordinating bargaining proposals and some Local 3145 proposals were identical with those made by other locals.

McGovern responded to Lockhart on May 28. She said that "the contracts will not be negotiated collectively at a national level and instead continue to be negotiated at the local level." McGovern stated, "We are negotiating in good faith, and we will continue to do so." McGovern wrote that that there had been major reductions in staff at National Headquarters and that merit increases had been suspended for non-union staff for fiscal year 2010 and she cited the suspension of matching 401(k) contributions for all staff.[16] McGovern said, "Our current proposals seek to provide all bargaining unit members with the same insurance, under the same terms, as the rest of the region staff."

12. Ninth Session, June 1, 2009

The parties and Mediator Dubin met on June 1, 2009. A number of open issues were discussed. The employer's medical insurance proposal was unchanged. The Union proposed to change Article XV as follows:

> Full-time and part-time bargaining unit employees will continue to participate in the American National Red Cross Retirement System without employees contributing to the cost.

This change would strike the language permitting changes to the Retirement System. The Union proposal was rejected by the employer. The employer did not propose any amendments to Article XV.

On June 26, 2009 Strouse wrote to Lockhart and Union president Lenentine about the Connecticut Region's payments to the American Red Cross Retirement System. From July 1,

[16] McGovern's letter did not mention bonuses.

2008 to June 30, 2009 the Region paid 4.25% of payroll to the pension plan. For fiscal year July 1, 2009 to June 30, 2010 the Region was required to pay 10% of payroll to the plan. This amounted to an increase from $469,141 in FY 09 to $1,103,860 for FY 10. On June 30 the Union asked for the actuarial reports in order to verify these figures; this information was provided in due course.

Also on June 30, 2009 the Union asked Strouse when it would be given the details of changes due to take effect January 1, 2010 in the Benefits Advantage plan. Strouse replied that he had not yet received any information relating to insurance changes.

On July 13, the company provided the Union with some health benefit utilization and cost data for the Benefits Advantage plan for dates from April 1, 2008 to March 31, 2009. Among other items, the document showed that 2200 employees of regions or chapters nationwide participated in fully insured health benefit programs. This figure amounted to about 9 ½ % of the total number of employees shown on the document.

Due to scheduling difficulties not detailed in the record, the next bargaining session was not held until July 27, 2009

13. Tenth Session, July 27, 2009

At the July 27, 2009 bargaining session, the employer distributed a list of tentative agreements from previous sessions and presented its latest contract proposals. The medical insurance provision was unchanged from the paragraph first given to the Union on April 19. There was no Article XV proposal concerning retirement.

The employer offered a wage freeze for the first two years and a 2% increase the third year of the contract; this was a change from the previous proposal for a three-year wage freeze. Strouse also asked whether the parties could move forward with the medical plan offered by the company if he agreed to an eight hour day as the basis for computation of non-work time. The parties discussed pension costs. Union president Lenentine said the Union had made concessions three years ago and would not agree to any concessions this time. Lockhart pointed out that the company had proposed other concessions in addition to the wage freeze and the change in benefits.

On July 27 the employer gave the Union a document entitled “Medical Plan Design Information, last updated 07/16/2009.” This document provided a side-by-side comparison of the current 2009 Benefits Advantage plan with the changes slated to take effect January 1, 2010.[17] Lockhart and Levarek testified that the 2010 changes were significant: they pointed out that in the EPO plan the copay for a primary and specialist doctor office visit would more than double. For laboratory, surgery and hospital costs, instead of a stated copay dollar amount the employees would be required to pay a percentage of the cost. For example, if the cost of out-patient surgery was high and into the thousands of dollars, the employees would pay a larger amount than the heretofore defined $10 or $20 in the 2009 plan. Levarek pointed out that the previous employee copy-pay of $150 for inpatient surgery would change in 2010: the employee liability would be 10% of the total cost. It would be impossible for the employee to know in advance what the liability would be. If an operation cost $50,000 the employee would be required to pay much more than the old $150 co-pay. Benefits Advantage also offered a

[17] The July 27 document showed the cost sharing between employees and the employer for the medical plan, dental plan and the vision plan.

standard PPO in 2010 rather than the previous choice of both a standard and a premier PPO; employee costs under the PPO would rise as well.

Lockhart and Levarek both pointed out that in 2009 the employees paid 20% of the cost for either the EPO or the PPO with the employer contributing 80%. In 2010 the employer would pay 80% of the cost for the EPO and the same dollar amount for the PPO. Employees choosing the PPO would pay the difference in cost between that dollar amount and the cost of the PPO. In addition, cost sharing for the dental plan changed from 95% paid by the employer and 5% paid by the employee to 60% employer/40% employee. There were changes in the dental benefits.

The new plan would also change coverage and benefits with respect to prescription drug benefits.

Finally, the employer told the Union that in the year 2010 employees whose spouses had other insurance would pay $100 per month in order to be covered by Benefits Advantage; this was over and above the cost of coverage for individual plus spouse or individual plus family. I note that Respondent's description of this extra cost was never clearly defined in the record; I cannot determine whether the $100 per month would be payable only if the spouse were actually covered by other insurance or would be payable if the spouse merely had access to other insurance but did not participate in that insurance.

There were many other changes in the 2010 medical coverage which were disadvantageous to the employees and which need not be set forth in detail.

The Union responded to the 2010 insurance information by saying it would comment after receiving a report from its insurance consultant. Following the negotiation session, Lockhart asked Levarek how to figure out what the employer savings would be under the 2010 plan. Levarek advised Lockhart to ask the employer for the value of the changes. She eventually assisted Lockhart in preparing a further request for information, described below.

On July 27, Mediator Dubin told the Union that if it got closer to a wage freeze for the first two years of the contract then there could be a 2% increase in the third year and there would be movement on other issues. The parties discussed other issues through the mediator, including the Union demand for an eight hour work day in connection with the computation of benefits under the contract.

14. July 2009 Memo from Sullivan

On July 28, 2009 Connecticut CEO Sullivan gave the Region's employees an email describing changes to their Benefits Advantage insurance. Employees were told that only one PPO would be offered and there would be additional costs to employees. EPO coverage would be more expensive. There would be changes in prescription drug coverage and dental coverage. Spouses with access to other insurance would be charged an additional $100 above the standard fee for family coverage. Employees could choose vision coverage but the Red Cross would not subsidize this option.

15. Eleventh Session August 30, 2009

On August 30, 2009 Lockhart asked Strouse whether he had the authority to negotiate a different medical plan from the one described in the July documents. The Union believed that the National Red Cross was behind the bargaining. Strouse replied that he had full authority to

negotiate for the Connecticut Region. Following this exchange, the Union changed its position on two major items in the negotiations, health insurance and wages.

The Union announced that it would present a new medical insurance proposal. Lockhart said he would now attempt to negotiate within the Benefits Advantage structure and abandon the Union's earlier Anthem fully insured proposal. Lockhart asked Strouse 10 questions about medical utilization data.

Then, in order to make a new insurance proposal, Lockhart asked for information about the cost savings represented by the July 27 document showing changes in Benefits Advantage for 2010. For each change from 2009, Lockhart asked what change in cost the employer was anticipating. Lockhart gave Strouse the first page of the side by side medical plan comparison between 2009 and 2010 and he wrote "request for each line change cost." The document does not specify whether the Union sought information nationally or for Connecticut or the bargaining unit only. On cross examination Lockhart said he sought information for the Connecticut Region and the bargaining unit. He was not asked whether he also wanted the information on a national basis. Strouse's testimony about this information request does not state that the Union confined its inquiry to Connecticut and the bargaining unit.

As a guide to his information request, Lockhart furnished an example of a "medical plan savings assumptions" sheet provided to the Union by the City of Meriden. The savings assumptions were made in preparation for negotiations and contained information such as "1.24% savings for every $5 increase in the Primary Care Office Visit Copay" and "0.25% savings for every $100 increase in the Outpatient Surgery Copay." Also as an example, Lockhart told Strouse that the employer was proposing to raise the copay for a doctor visit from $10 to $25 and he asked Strouse tell him what cost savings to Benefits Advantage was anticipated from this increase as well as all the other changes in 2010 Benefits Advantage. Strouse replied that he would look into the matter.

To advance the negotiations, Lockhart said the Union would bring its insurance consultant to the negotiations and suggested that the employer bring a representative from Hewitt. The employer did not agree to this suggestion.

The Union presented its new wage proposal on August 30: it agreed to a wage freeze during the first year of the contract with increases of 3% in both the second and third years. Strouse said this was a significant change in the Union's position. Non-unit employees were subject to a wage freeze and Strouse wanted the unit employees to be treated the same way with respect to both wages and health benefits.

The employer presented new Article XIV language at this session:

> The current group medical, dental, vision, long-term disability, EAP and life insurance benefits plans and the premium cost sharing currently in effect will continue through December 31, 2009. Thereafter, the Employer will provide the same group medical, dental, vision, long-term disability, EAP and life insurance benefits, under the same terms and conditions, the same costs of the coverage under the plans and with the same premium contributions and any surcharge as for the Employer's non-bargaining unit employees. It is understood that the Employer may change group insurance providers or self-insure such benefits during the life of this Agreement. Any changes or amendments to the plan(s) automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. During calendar year 2010, full-time employees will pay 20% of the medical

benefits premium cost (10%) for employee only coverage) for the PPO plan and part-time employees will pay 30% of the medical benefits premium cost for employee only coverage for the PPO plan, plus if an employee's spouse/domestic partner is eligible for medical benefits through the employer of the spouse/domestic partner but the employee nonetheless elects to cover the spouse/domestic partner though a medical plan provided by the Employer, then the employee will pay an additional $100 per month in premiums for the medical benefits. The Employer, the Union and the employees are bound by the terms of the plans and issues regarding the plans shall not be subject to the grievance or arbitration process provided in this Agreement.[18]

I note that although Benefits Advantage is self-insured and therefore no premiums are payable to an insurance company, the employer's offer on cost-sharing was nevertheless couched in terms of "premiums."

On August 30 Strouse had an "off the record hypothetical discussion" with the Union to explore the possibilities for settlement. He mentioned the possibility of agreeing to a 40 hour work week and some flexibility on wages after an initial pay freeze lasting until October 1, 2010. Strouse's hypothetical discussion required acceptance of the health insurance proposal and settlement of all outstanding unfair labor practices and grievances.

16. September and October 2009

On September 29, 2009 Strouse wrote to Lockhart concerning the August 30 information request. He said, "The Region does not have the information you requested. It, however, did gather responsive information from the American National Red Cross…." Strouse enclosed the medical utilization information requested by the Union at the August 30 session. Strouse did not furnish any of the cost saving information requested by the Union. Strouse's letter stated the Connecticut Region's "opposition to creating a new medical plan with different co-pays and terms." He asked whether the Union would agree to the employer's health benefit proposal, that is, the language incorporating the 2010 Benefits Advantage plan.

The information Strouse provided to the Union showed that some Red Cross regions provided their employees with fully insured medical and dental insurance, including Kaiser plans in seven regions, various Blue Care plans in Michigan and a Dean Health plan in Wisconsin. Shearer testified that where required by collective-bargaining agreements with other Red Cross regions these fully insured plans can be administered under the Benefits Advantage umbrella.

Strouse characterized the Union's further request for cost savings information as:

[I]s there information available … line item by line item… to quantify what changes to any line item means in terms of overall cost or premiums charged? For example, when the "primary doctor office visit" co-pay increases from $10 to $25… what does this mean in terms of total cost or overall premium?

As to this request, Strouse wrote:

The Region has been informed that the American National Red Cross has not attempted to measure costs on such a line-by-line basis. The Region, however, has been informed

[18] There were no cost-sharing figures given for dental, vision, long-term disability or other insurance.

that it would be cost prohibitive to create a different medical plan to be provided to the bargaining unit members with different co-pays and other provisions as suggested by the Union. For example, to set up such a different plan and to administer it for the bargaining unit members would cost approximately an additional $100,000. Plus, there would be additional costs if there were lower co-pays and other more costly items included in such a separate plan as compared to the 2010 Benefits Advantage medical plan.

Strouse testified that the $100,000 cited in the letter represented documentation expense, filing expense, actuarial expense and third-party administration.

Lockhart testified that the Union had never before been given the $100,000 figure.

On October 5, 2009 Lockhart wrote to Strouse, noting that the scheduled annual open enrollment for medical insurance was approaching and that the parties had not reached agreement on the insurance benefits. Lockhart asked that the employer not make unilateral changes to health care benefits and reiterated that the Union had the right to negotiate this subject. Strouse replied on the same day, saying that open enrollment would commence on October 26. Bargaining unit employees would be given the same information as was provided to non-unit employees of the Region. This would represent the 2010 Benefits Advantage plan incorporated in the employer's offer to the Union. In order to preserve the status quo, the 2009 premium share percentages would be continued. Strouse stated that there would still be time for the parties to reach agreement on benefits and premium cost sharing.

The parties stipulated as follows:

In 2009, as it has done each year, Respondent began its annual open enrollment process in the fall. The open enrollment process was scheduled to begin October 26, 2009. In advance of open enrollment, written information was given to employees concerning the health benefits. The information included the 2010 Benefits Advantage plans as Respondent had proposed to the Union. The open enrollment information set out premium cost share percentages that were contained in the expired contract.

17. Twelfth Session, October 18, 2009

At the bargaining session of October 18, 2009 the Union responded to the employer's August 30 hypothetical discussion about a possible settlement. There was discussion across the table about many issues; some movement was made by the parties and some items withdrawn. Lockhart testified that both Lenentine and Holschlag were present at these negotiations. Strouse's notes do not record their presence.

The Union made a counterproposal on the medical insurance issue. It proposed that the medical insurance contract language in effect January 1, 2008 would be the standard of comparison for the duration of the collective-bargaining agreement. Thus, any future plan would have to be substantially comparable to the Benefits Advantage plan that had been introduced by the Red Cross for 2008. Lockhart noted that the 2008 plan was better for employees than the 2009 plan. Lockhart renewed the request for line item costs of medical coverage. The employer said it was working on the request. Strouse reiterated that it would cost $100,000 to make any change to the Benefits Advantage plan that would be in place starting January 1, 2010. Lockhart asked Strouse where he got this figure. Lockhart asked whether it would cost $100,000 for a different plan for the Connecticut Region only or it would cost $100,000 for changes nationwide. Lockhart noted that the employer was quoting the same figure to the

unions in the Buffalo and Michigan negotiations. Strouse replied that he did not know the answer to this question.

Strouse testified that the Union again asked for the line-by-line analysis of cost for the medical insurance proposal. Strouse said a line-by-line method of negotiating medical insurance would not work for two reasons: There was a $100,000 administrative cost to set up a new plan which the Region did not want to bear and CEO Sullivan was committed to having all employees in the Region on the same medical plan. Strouse testified that negotiating line-by-line would not get an agreement because the Region did not want that.

On October 21 Strouse circulated an email listing items that had been tentatively agreed on October 18 and listing open items that were on the table but not agreed to. Strouse asked the parties to offer corrections to the lists if he missed something or got something wrong. The document did not list retirement as an open issue. It showed that the employer had proposed a wage freeze until July 1, 2010 with two annual increases of 2% thereafter; the Union proposal was for a one year wage freeze followed by two 3% annual wage increases and 2% additional increases for employees not at the maximum rate. Strouse's list showed the employer's medical insurance offer was rejected by the Union. He noted that the next session was scheduled for November 15 and wrote that if no agreement was reached that day the parties would have to come to a resolution on health benefits so that benefits would be in place for employees on January 1, 2010.

On October 26 Lockhart notified Strouse that Holschlag had been elected president of Local 3145.

18. Thirteenth Session, November 15, 2009

On November 15, 2009 the Union gave the employer a document showing where it stood with respect to the employer's Benefits Advantage 2010 medical plan proposal. The document was based on the side by side comparison of the provisions of the 2010 plan with the 2009 plan then in effect. Next to each item the Union gave a response or asked a question. Thus, some items such as annual deductible or lifetime coverage limit were marked TA for tentative agreement by the Union. Other items where benefits were reduced from the prior year, for example a reduction from 100% coverage to 90% coverage for hospice care under the EPO, were marked rejected by the Union. For some items, such as an increase from $20 to $40 in the EPO copay for a specialist office visit, the Union countered with an offer of $22.50. On other items, the Union asked for information. For example, where the 2010 proposal reduced from 100% to 90% the coverage for outpatient X-ray under the EPO, the Union asked, "What is the median cost? If we consider this, may want to put a dollar cap on this, but need to know the numbers in order to respond." The response to the employer's PPO proposal under Benefits Advantage was similarly replete with questions and requests for more information about costs and utilization. Lockhart testified that the responses given to the employer on November 15 had been drafted by Gordon Pavey from the AFL-CIO and had been discussed with the national coalition of unions then engaged in bargaining with the Red Cross.

On November 15, 2009 Lockhart told Strouse that some items listed as tentatively agreed to on his October 21 email were wrong. Strouse thought the Union had revoked some agreements. The parties agreed to a document listing the status of proposals still on the table and showing which were agreed and which were withdrawn.

Strouse offered to resume Union dues deductions and grievance arbitrations if a side agreement could be reached on the medical insurance issue. The Union rejected this offer.

The Union proposed to withdraw the unfair labor practice charges concerning the unilateral changes in the Retirement System and the 401(k) in exchange for a medical insurance proposal that would delete the current contract language permitting the employer to determine whether a new plan was substantially comparable and that would require the employer to negotiate with the Union over changes in the plan. The Union also wanted dental coverage to be paid 100% by the employer. The Union said it would work within the Benefit Advantage plan but it wanted to negotiate line-by-line each change in medical insurance proposed by the employer. The Union had consistently maintained that it wanted to preserve its right to negotiate the medical plan. Lockhart testified that Strouse told the Union it would cost $100,000 to set up a stand alone plan for the bargaining unit; when Lockhart asked what this meant he did not get a clear answer from Strouse.

This was the last meeting attended by Strouse.

19. Fourteenth Session, December 6, 2009

The December 6, 2009 meeting was the first negotiation session at which Steven Suflas, Esq., represented the employer. Suflas told the Union that the Region was under economic pressure and that both a national wage freeze and a national medical plan were needed. Lockhart responded that the Connecticut Region was meeting its goals and that concessions were unnecessary because the Region was in a favorable economic position. Lockhart said collections in Connecticut were up and there had been increases in the prices of blood products.

Lockhart asked Suflas if the employer would provide the previously requested line-by-line costs for the proposed Benefits Advantage plan. Lockhart testified, "I asked if the Red Cross would provide the line-by-line costs on medical changes the Union requested at the past meeting." He explained that the Union needed a line-by-line listing of the savings that would be achieved by the Benefits Advantage changes for 2010. Testifying from his notes of the meeting, Lockhart said, "This is my clarification of the Union's request on the medical costs. And I made it clear that it was a line-by-line cost of changes. It was for the region and also for the Union. We wanted separate costs for bargaining unit members and, you know, and the region as a whole, and the same for the national plan as a whole…." Suflas said he would look into this.[19]

Lockhart gave Suflas a list of proposals showing which were agreed to and which were still outstanding. The parties reviewed the list and discussed open items.

The Union proposed new language for Article XIV:

> For the duration of this agreement the Employer will provide health, vision, prescription, drug and dental benefits plans including Connecticut State mandates for employees and their dependents in accordance with the terms of the respective contracts or substantially comparable plans as determined by the Employer and the Union. It is understood that the Employer may change group insurance providers during the life of this agreement as long as the benefits, administration and network are substantially comparable to the plan in effect on January 1, 2007. The Employer shall pay not less than the following percentages of the cost of the benefits

[19] This was the information requested of Strouse on August 30, 2009 based on the Respondent's July 27 document showing changes in Benefits Advantage from 2009 to 2010.

Add Delta Dental- Employer (Red Cross) paying premium share of

80% full-time
50% part-time

This proposal added the Connecticut State mandates to the language. Significantly, it changed the reference point for a "substantially comparable" plan to the plan in effect on January 1, 2007. That plan was not a Benefits Advantage plan, it was a Connecticut stand alone plan. On October 18 the Union had used the January 1, 2008 Benefits Advantage plan as the benchmark. The Union proposal also included Delta Dental which was not a Benefits Advantage plan.

The Union wage proposal called for a freeze the first year, a 2.5% increase on April 1, 2010 and a 3% increase in April 1, 2011. There would be a 1% step increase for those below the maximum rate on April 1, 2010 and April 1, 2011.

The chart of open items prepared by Lockhart showed that Article XV, Retirement, was an open issue on which no agreement had been reached. The Union had not withdrawn its retirement proposal of June 1, 2009 that unit employees would continue to participate in the Retirement System.

Lockhart reviewed the "hypothetical discussion" of August 30 and suggested agreement on the 40 hour work week, that both parties would withdraw all outstanding issues, that the medical plan design would remain the same through 2010 and, if this was the basis of a settlement, the Union would withdraw the unfair labor practice charges relating to the Retirement System and the 401(k).

Suflas responded with no change in the employer's wage offer. He said that all the employees had to be in the same medical plan. Suflas said the Union insurance proposal was regressive and that the parties were not making any headway. He argued that having all employees in the same medical plan insured that the plan would not be denuded in the future. Suflas emphasized that economies of scale would be achieved by one national plan. Holschlag commented that the national plan was not in the best interests of the Connecticut employees. Lockhart replied that the Union had no problem with the national plan but it wanted to be at the table when the plans were designed and it wanted to maintain its grievance rights. He pointed out that the Union had abandoned its proposal for a fully funded insurance plan such as the Anthem plan.

Lockhart testified that at this point the parties were very far apart in the negotiations for medical insurance.

20. December 2009 and January 2010

On December 8, 2009 Suflas wrote to Sabin Peterson, Director, Labor Relations at the American Red Cross in Washington, DC, about the Union's request for information. Suflas wrote:

> [T]he Union claims that in designing a medical benefits plan, the administrator can determine projected savings from design changes on a line-by-line basis. As a result, the Union has asked for:

First, line-by-line projected savings for each change in the plan calculated at the Regional level, including both bargaining unit and non-bargaining unit personnel.

Second, line-by-line projected savings for each change in the plan calculated at the national level.

Peterson asked David Burroughs from the Benefit and Retirement Programs at the Red Cross about the information. On December 8, Burroughs responded to Peterson, copy to Anna Shearer, saying that he could

> [R]eadily get the savings on a national, consolidated basis but because we don't segment the units in determining the annual premium equivalents, we are unable to provide the first part at this time."

At Peterson's request, Burroughs obtained a proposal from Hewitt Associates to obtain the line-by-line projected savings for each change in the plan calculated at the regional level. Hewitt estimated the project to take 12 to 16 weeks and cost $25,000. This proposal was dated January 11, 2010. Suflas did not send a copy of the Hewitt proposal to the Union.

Shearer testified that she was aware that in the fall of 2009 the Union had asked the employer to furnish the Union with the cost savings associated with each line item of the 2010 Benefits Advantage plan. Shearer did not know that the Union had been asking for this information since August 30, 2009. She knew that as part of the information request the Union sought line-by-line savings information for the Connecticut Region. Shearer testified that the information did not exist for the Connecticut Region because the claims payer does not know whether an employee is a bargaining unit member in Connecticut. Information showing that an enrollee is a unit member is not transferred to the claims payer. In addition, Shearer's staff does not have access to individual claims; information is aggregated for all the people in Benefits Advantage.

I have read Shearer's testimony carefully. I note that Shearer did not testify that the cost savings associated with each line item of the 2010 plan did not exist for the Benefits Advantage plan as a whole, that is, on a national level. She only said that it did not exist for unit/union members. Thus, some of the information requested on August 30 and again in the fall of 2009 was available, specifically, the costs savings to be achieved line-by-line on a national level.

Indeed, Shearer referred to the Suflas-Peterson-Burroughs exchange of e mails on December 8, 2009 quoted above, in which Burroughs said he could readily "get the savings on a national, consolidated basis."[20] Shearer confirmed that her staff asked Hewitt about the cost of obtaining the Regional level information and she identified the January 11, 2010 letter from Hewitt that estimated the price as $25,000. She confirmed that this letter was not provided to the Union.

On December 17, 2009 Suflas sent Lockhart an Excel spreadsheet with a line-by -line calculation of the projected savings per capita for some of the proposed 2010 changes in the Benefits Advantage medical and prescription drug benefits. Lockhart testified that this was an inadequate response to the Union's request for information. The Union had asked for the savings related to over 100 items in the plan design but the spreadsheet only provided information as to 12. The information supplied showed savings due to some changes such as

[20] Burroughs, a manager of life and health benefits, reports to Shearer.

deductibles, coinsurance, and some office visits and certain drug charges. There was no information about cost savings resulting from changes in insurance for surgery, X-rays and lab tests, to choose only a few examples.

Shearer testified that she had not seen the December 17 spreadsheet before the instant hearing but it might have been prepared by someone in her office. Shearer said the information presented on the chart is aggregated to show the common plan design elements that are relevant to driving costs up or down. Significantly, Shearer explained that the line-by-line cost implications of the various elements set forth on the spreadsheet represented the type of information prepared by actuaries to analyze changes in plan design and then identify the impact of the changes on the total cost of the plan. In examining design changes year after year one looks at this data.

Respondent presented no evidence concerning the actual preparation of the spreadsheet. Respondent did not explain why the few items on the spreadsheet had been selected and why the other requested information had not been furnished to the Union.

Lockhart explained the Union needed all the requested cost information in order to make a full proposal to the employer; the cost of the Union's proposal could be the same as under the employer's 2010 plan but the design might be different. Further, Lockhart testified, the information provided to the Union was for the entire country but the Union was only negotiating for the Connecticut Region. Lockhart explained his concern to Suflas in a letter of January 8, 2010 where he said:

> Based on … side-by-side comparisons of the 2009 plan designs to the 2010 proposed plan designs for the EPO plan, there are approximately forty seven (47) line items. Thirteen (13) of those changes the Union has agreed to. Twelve (12) are referenced on your spreadsheet and that leaves approximately twenty two (22) line items that have not been addressed. With the PPO plan there are approximately seventy seven (77) line items. Thirty eight (38) of those changes the Union has agreed to. Twelve (12) are referenced on your spreadsheet; that leaves approximately twenty seven (27) line items that have not been addressed.

Lockhart asked Suflas to advise him whether the employer would provide the cost savings for the line items not referenced on the spreadsheet. He attached a copy of the Union's November 15, 2009 letter listing of all the insurance changes, indicating which changes had not been addressed on the Excel spreadsheet.

On December 22, 2009 Holschlag wrote to Suflas that the unit members had received new health insurance cards with the employer's proposed copay changes. She asked whether the employer was implementing a unilateral change.

Suflas replied to Holschlag in a December 31 letter to Holschlag and Lockhart giving notice that effective January 1 the employer would implement all the plan design changes incorporated in the 2010 Benefits Advantage plan.[21] The percentage cost of the premiums paid by unit members would remain at the 2009 levels, subject to further collective bargaining. Suflas gave various reasons for the implementation. (1) He said the parties were at a bargaining impasse with respect to the plan design changes for 2010 enabling the Region to unilaterally implement its last bargaining proposal. (2) Plan design changes are annually

[21] The Union received the letter January 4, 2010.

occurring events and the employer has an established practice of adjusting benefits on an annual basis. (3) The employer has a long-standing practice of exercising its discretion to modify benefits so the implementation of changes are a continuation of the pre-existing status quo. (4) As a matter of past practice, Article XIV authorizes the employer to implement changes and the language of Article XIV constitutes a waiver of the Union's right to bargain over plan design changes. Suflas ended by saying that the employer would continue bargaining about the Benefits Advantage proposals notwithstanding unilateral implementation of the 2010 changes.

Suflas testified that the decision to change the health benefits of the unit employees was made late in December and the Union was officially notified of the changes on December 31.

On January 13, 2010 the employer sent a letter to all part-time employees informing them that effective January 1, 2010 the long term disability plan had been discontinued. The letter told employees they would "not be eligible for long term disability" as of January 1. Presumably the letter meant to tell employees they would not be eligible for long term disability insurance. Lockhart testified that there had been no negotiations on this subject.

21. Fifteenth Session, January 18, 2010

On January 18, 2010 the parties discussed various open issues. The employer offered a package of seven open items concerning some smaller issues in the negotiations, but the Union did not accept the package. Suflas told Lockhart that he was working on a letter in response to the Union's request for information. Due to scheduling difficulties the parties agreed to the next meeting date of March 26.

On February 18, 2010 Suflas replied to Lockhart's January 8 letter about the failure of the employer to provide requested insurance information showing the savings achieved by changes in medical and prescription coverage. Suflas said that his prior letter of December 17, 2009 had provided "all the information to which the employer has access." He explained this by saying:

> The percentage change for primary care physicians and specialist physicians was aggregated into a single number.
>
> For all other items, such as out-patient laboratory charges, out-patient surgery charges, etc., those numbers were likewise not separately calculated, but were rolled up into the calculation for "co-insurance (plan pays)."

Neither Suflas nor any other employer witness explained why the cost savings in out-patient laboratory charges, out-patient surgery charges and the myriad other charges were "rolled up" or "aggregated" into one figure as stated in Suflas' letter. Similarly, neither Suflas nor any other employer witness explained why the National Red Cross has not provided all the national line-by-line information which Burroughs had said was readily available. I note that when Suflas wrote that this was the information "to which the employer has access" he was referring to Respondent and not to the American National Red Cross.

It is clear that when the National Red Cross prepared the information for the employer someone made the decision to add up the figures for the individual costs savings achieved by the many changes in the 2012 plan and present them to the Union in such an aggregated and incomplete fashion. But the reason for doing this and the person responsible for the decision were not addressed by the Respondent.

Lockhart testified that the employer's response was not acceptable. From experience he believes that any insurance company or self-insured entity keeps on a regular basis the type of information the Union sought.

22. Sixteenth Session, March 26, 2010

Suflas opened his presentation on March 26, 2010 by asking whether the Union had the authority to reach an agreement or whether it needed approval from the coalition. Lockhart said he had the authority to negotiate subject to ratification by the unit members. The Union had scheduled a strike vote for March 28 in an effort to pressure the employer to reach an agreement. Lockhart complained to the employer about what the Union believed were inaccurate statements in a letter Regional CEO Sullivan had just sent to unit employees concerning the negotiations and a possible strike.

The employer proposed a new complete package as a "road map to move forward." The benefits proposal did not change; employees would still be covered by the 2010 Benefits Advantage plan. Among many other items, the employer proposed a 2% wage increase on ratification and a 2.5% increase in 2011, with no 1% step increase for employees not at the maximum rate. A new overtime provision was less favorable to employees than the previous contract language. Items that had been tentatively agreed to would stand and some proposals would be withdrawn.

Lockhart began his response by saying that the Union wanted an agreement, not a strike. With respect to health insurance he said the Union still needed the line-by-line cost for the 70 items on the plan design for Benefits Advantage that were not responded to by the employer; the Union could not intelligently prepare a proposal without the line-by-line information. Suflas asked whether the Union was willing to share the cost of compiling the information. However, Suflas did not mention Hewitt's proposed cost of $25,000 to the Union nor did he explain how Hewitt arrived at the $25,000 figure. Suflas did not say this was the cost for the regional Connecticut information. Lockhart responded that he had never heard of an insurance company that did not have line-by-line data.

The Union responded to each item on the employer's proposal. Lockhart presented a new proposal. The Union would agree to retain the 2009 plan design. In other respects as well, the new Union proposal was less generous to employees than the 2007 plan previously requested by the Union. Holschlag said that it was giving a lot for the Union to move from its original demand of a fully insured plan.

The Union said it could agree to the employer's wage proposal, including a first year wage freeze, but it wanted the 1% increase for those not at the maximum rate. Following this exchange, Suflas asked whether the parties could settle all the other issues on the table and leave the insurance issue for another time. Lockhart replied that the Union was not opposed to a national health plan but it wanted input into the design. He said the parties could agree on the overall cost of the 2010 Benefits Advantage plan and look at the line-by-line costs to give the Union the ability to share in the design. Lockhart said the unit was a small group that had to have its voice heard. He pointed out that the coalition's attempt to have input into the national plan was rejected. Suflas replied that he was only negotiating for the Connecticut Region.

Suflas noted that the biggest issue dividing the parties was health care. He said that giving the Union information would not change the fact that the parties were miles apart; the company did not want to make line-by-line changes to the medical plan and the Union wanted to know the line-by-line costs so that it could move cost items around. The employer did not want

to bear the extra administrative costs of providing different benefits for the Connecticut Region.

23. Seventeenth Session, April 25, 2010[22]

On April 25, 2010 the parties began by reviewing the tentative agreements and the open items. Suflas handed out a copy of tentatively agreed items and a new contract offer.

The employer presented what it termed its "last and final offer." Suflas said this was an "exploding offer"; it would expire if not ratified by May 5. Suflas said there were major concessions in the offer but these were tied to the Union's acceptance of the me-too language in the medical benefits provision. Achieving Union agreement to the me-too language was the driving force behind the new offer.

The wage offer was now changed to include a 1% step increase for the first year of the contract and none thereafter; the Union had proposed a 1% step increase for two years. The offer contained wage increases of 2% and 2.5%, with an increase in maximum rates. A ratification bonus of $250 per capita was added for the first time.

The me-too language of Article XIV concerning health benefits was unchanged.

The last and final offer did not mention Article XV, Retirement.

Other difficult issues for the Union were addressed by this last and final offer.[23] However, Lockhart said the Union could not agree on a total economic package without knowing the medical plan design and the co-pays being locked in for the term of the contract. The Union wanted to fix the medical benefits for the duration of the collective-bargaining agreement; this was the complete opposite of the employer's me-too proposal. The Union position had always been that it did not want to give up its right to negotiate medical benefits for the members.

Lockhart told the employer that the Union needed a contract that spelled out the employee share of the insurance costs and benefits. The Union could not give the company the right to offset future wage increases with decreases in medical benefits. Lockhart told Suflas that the employer could not take the "me-too" language of the proposed Article XIV to impasse; he meant that the employer could not claim impasse and force the Union to give up the right to negotiate on insurance benefits.

Suflas replied that other units around the country had accepted the "me-too" language, both in the past and recently. In his opinion the level of benefits offered by the employer was hard to find elsewhere. Suflas said the medical plan would not be stripped bare in the future. He emphasized that the cost was nationwide. He closed by saying that if the plan failed the members they would be back at the bargaining table in 2012. Lockhart said the plan had already failed the employees; the current plan was far from the plan in effect in 2008. The Union was better off fighting the issue now

[22] Counsel for the General Counsel's Brief places this meeting on April 26, 2010.

[23] The employer withdrew its proposal to delete some hours that counted towards overtime computation, it withdrew a proposal related to overtime pay that would have reduced employee compensation for Saturday work. There were other concessions that are not necessary to list here.

The Union agreed to take the employer's last and final offer to the membership for ratification but it did not recommend that the members accept the offer. In the event, the employer's offer was voted down on May 2, 2010. Suflas then informed the Union that the employer was willing to bargain if the Union had new proposals. Eventually, the Union contacted the employer about dates for bargaining on new proposals.

24. Eighteenth Session, June 1, 2010

When the parties met on June 1, 2010 the Union had given the required 10-day notice for a June 2 strike.

On June 1 the Union gave a counter-offer to the employer's last and final offer of April 25. The Union's health insurance proposal changed significantly. The Union agreed to the 2010 Benefits Advantage plan design, with some exceptions. The Union proposed to eliminate the $100 per month charge for spouses who had other insurance. The employee share of the cost for would be 10% for individual coverage, 20% for family coverage applied to whichever plan was selected, either PPO or EPO.[24] The employer would establish a Health Savings Account of $500 for single employees and $1000 for family coverage. Finally any changes in Benefits Advantage for the year 2011 would have to be negotiated with the Union, thereby stripping the me-too language from the contract.

The Union made a significant move by proposing a change in the pension language which did not require newly hired employees to have access to the Retirement System. The Union proposed that employees hired after July 1, 2009 would have a 401(k) with an 8% matching contribution by the employer. Current employees would stay in the defined benefit plan with an option to participate in the 401(k).

The Union made a counteroffer on staffing. Further, it agreed to all previous tentatively agreed items. The wage offer was for a freeze the first year and 2.5% increases in the next two years with 1% step increases.

Lockhart told the employer that the Union would call off the strike if the employer agreed that there would be no me-too language in the medical insurance provisions and if a staffing issue could be settled by agreeing to the presence of a nurse at all blood drives.[25]

The parties agreed to meet on June 16, 2010.

The Union conducted a three-day strike beginning on June 2.

25. Nineteenth Session, June 16, 2010

At the bargaining session of June 16, 2010 the parties discussed a list of open items and new proposals which Lockhart had previously sent to Suflas. The parties reviewed a revised list of tentative agreements. At this meeting, as at many others, the parties communicated through the mediator.

The Union withdrew its demand for an 8% matching 401(k) contribution and it agreed to maintain the current staffing language. The Union had a new proposal concerning company

[24] Different cost-sharing was proposed for part-time employees.

[25] This issue had been discussed at previous bargaining sessions.

vehicles and travel time. Lockhart asked the mediator to find out from the employer, "If the Union would consider the Red Cross Medical proposal in full, could that move us toward a settlement?" Lockhart testified that there was no response to this question.

Suflas summed up his view of the Union's health insurance proposals. He said the Union's proposal would cost $125,000 per year for the health savings account, the changes in premium would cost $90,000 more and the cost of a separate health plan administration was $100,000 per year. Further, he calculated the Union's wage demand at $100,000. Suflas said there was a chasm separating the parties.

Lockhart summed up his view of the negotiations. He said the Union did not believe that the employer had offered anything in return for concessions on the medical insurance. Even though the Region offered wage increases in the second and third year, these were coupled with a reduction in premium time pay, overtime pay and days counted toward overtime. Further, the Union was not given necessary plan design information. Lockhart emphasized that the employer never offered medical insurance that deviated from the American Red Cross national plan and never modified its insistence that the Union give up its right to bargain about the plan and waive its right to the grievance procedure on insurance issues.

Lockhart said the Union could not overcome the problem: it could not agree to me-too language for the medical insurance. Lockhart said the employer wanted me-too or nothing. Suflas replied that the company had moved on every other item except for the me-too provisions because that was important.

At the end of the session Suflas said they were done for the day and Lockhart responded that there was no need to set another date until the Union had met with the membership and assessed the position.

The record shows that following the June 16 session the Union proposed to meet on October 17, 2010. Suflas was unavailable but he said he would get back to Lockhart with some dates. There is no evidence before me that the parties engaged in any negotiations after June 16, 2010.

III. Discussion and Conclusions[26]

A. Changes to the Retirement System and the 401(k) savings Plan

The General Counsel argues that Respondent violated Section 8(a)(5) when it made unilateral changes by closing the Retirement System to new hires and by ceasing matching contributions to the 401 (k) Savings Plan and offering enhanced benefits without notice to the Union and an opportunity to bargain. Citing *NLRB v. Katz,* 369 U.S. 736, 742-743 (1961); *Convergence Communications, Inc.,* 339 NLRB 408, 412 (2003). Respondent does not assert that the parties reached impasse on these issues. Rather, the employer argues that

Respondent's implementation was consistent with its duty to maintain the dynamic

[26] Pages 11 and 12 of Respondent's Brief on the medical insurance issue purport to quote from the 2006-2009 collective-bargaining agreement between the parties. The quoted material is not from that contract and it is incorrect. It follows that many of the arguments made by Respondent purportedly based on Article 14 the expiring 2006-2009 contract are inaccurate and based on non-existent language.

> *status quo* according to a longstanding past practice of changes to the plans, with the acquiescence of the Charging Party, and according to the terms and conditions of employment established under the language of the expired collective-bargaining agreement…. Alternatively, assuming *arguendo* that there was a duty to bargain, Respondent provided the charging Party with sufficient notice and opportunity to do so prior to implementation; however, Charging Party failed to request bargaining. Further, Respondent's implementation of the changes fell with[in] the types of exceptions recognized in *Bottom Line Enterprises*.

The Supreme Court in *Katz* noted that change pursuant to a longstanding practice is essentially "a mere continuation of the status quo." 369 U.S. at 746

In *The Post-Tribune Co.*, 337 NLRB 1279 (2002), the Board found no violation where the employer passed on to employees without bargaining with the union a portion of the premium increases imposed by an insurance carrier because "the Respondent followed an established past practice and did not alter the status quo…." In that case, each time the insurance carrier changed the dollar amount of the premiums the employer notified the employees of the new dollar amounts of their share of the premiums using a fixed percentage to calculate the amounts. The Board cited the reasoning in *Katz* that an established past practice can become part of the status quo. The Board noted that employees were aware of the past practice relating to premium increases and that the union did not inquire about the basis for the past premium increases and acquiesced in these increases. 337 NLRB 1280, fn. 4.

In *Courier Journal*, 342 NLRB 1093 (2004), the Board majority found no violation where the change in insurance premiums was pursuant to a 10 year past practice of unilateral changes. The Board found that the employer's discretion was limited in that it treated its represented employees in the same manner as its unrepresented employees. Chairman (at that time Member) Liebman's dissent was based on her differing analysis of the facts. She noted that "employers may act unilaterally pursuant to an established practice only if the changes are not made in the exercise of managerial discretion." 342 NLRB at 1096. The dissent agreed with the ALJ that the appropriate lack of discretion exists only where an employer is "limited to responding in fixed way to a decision made by an insurance carrier or other circumstances beyond the control of the Respondent's management." 342 NLRB at 1101.

As Counsel for the General Counsel acknowledges in his Brief, "whether a change is a permissible continuation of the status quo turns on the degree of discretion involved", citing *Our Lady of Lourdes Health Center,* 306 NLRB 337, 340 (1992), where the unlawful unilateral actions "entailed a degree of discretion well beyond that of continuing the status quo…."

The collective-bargaining agreement between Respondent and the Union names the "employer" of the unit employees as "The American Red Cross Blood Services, Connecticut Region." Furthermore, the collective-bargaining agreement recognizes that the "employer" of the unit employees is a distinct entity from the "American National Red Cross". Article XV refers to actions that may be taken by the "American National Red Cross" that will bind "The Employer, the Union and the employees." Thus, it is clear that the American National Red Cross is not the employer of the unit employees. The Union is aware that it negotiates with the Connecticut Region and not with the American National Red Cross. Indeed, the May 2009 letter sent to McGovern by Lockhart and representatives of other union locals sought to negotiate with the "National American Red Cross" instead of the various local Regions. This initiative was rejected by McGovern.

The facts in this case show that the Respondent employer did not make any changes to

the Retirement System or to the 401(k) Savings Plan. The changes were made by Board of Governors of the American National Red Cross. Respondent had no input and exercised no control over the changes. Respondent did not decide to close the Retirement System to new employees and it did not decide to discontinue contributions to the 401(k). Respondent did not establish the enhanced 401(k) benefits for employees hired after July 1, 2009.

The collective-bargaining agreement recognizes that Respondent has no control over the Retirement System. Article XV of the collective-bargaining agreement acknowledges that the American National Red Cross has the "sole discretion" to amend the Retirement System and that Respondent, the Union and the employees are bound by its terms. Similarly, the collective-bargaining agreement provides that the National 401(k) Savings Plan will be offered to employees on the same basis as it is offered to hourly non-represented employees.[27] This contract language is not a waiver of bargaining rights during the term of the collective-bargaining agreement. The language does not reserve rights to management. Rather, the language states the reality that the employer is bound by the actions of a third party which does not participate in negotiations, namely, the Board of Governors of the American National Red Cross.

I find that the changes made to the Retirement System and to the 401(k) Savings Plan did not involve the exercise of any discretion by the Respondent.

The consistent past practice under the collective-bargaining agreement was for employees to be informed of any changes to the Retirement System and the 401(k) and for those changes to become effective as announced. All employees of Respondent, including officers of Local 3145 and members of the negotiating committee, received periodic announcements and the summary plan descriptions that incorporated the changes. At the commencement of each round of negotiations Lockhart asked for the relevant plan information and he was furnished with the latest documents incorporating all amendments made by the Board of Governors to both the Retirement System and the 401(k). Thus, the employees, the officers and the bargaining committee of the Union and its chief spokesperson were all aware of the changes made over the years and there is no evidence that the changes made by the Board of Governors of the American National Red Cross were ever challenged by the Union.[28]

The Retirement System and 401(k) changes implemented in the past were often quite significant and were not limited to technical changes necessitated by the IRS Code or ERISA or other regulatory modalities. For example, in 2000 the Retirement System was amended to pay a 2% ad hoc benefit to retirees and to decrease the employer contribution rate from 2% to 1%. The first change would require an increased payout and the second change would significantly decrease the amount of contributions received by the System, potentially impacting current employees as well as retirees. Again, in 2003, 2004 and 2005 the employer contribution was changed, each time resulting in a significant difference in the revenue to the System and potentially impacting current employees. In 2005 the eligibility criteria for joining the Retirement System were changed and the benefit formula was amended, resulting in a reduction in benefits to employees for years of service after July 1, 2005. In 2005 voluntary contributions to the System were discontinued, thereby depriving those employees who wished to obtain an additional annuity of a significant benefit. Major changes were made to the 401(k) Savings Plan

[27] The record establishes that the Board of Governors of the American National Red Cross has the sole discretion to amend the 401(k) Savings Plan.

[28] Similarly in *Post Tribune* the union did not inquire about or object to previous changes, 337 NLRB 1279, fn 4.

after it was established in the year 2000. In 2005 changes were made to the employee contribution level and to the percentage of matching employer contributions. The immediate vesting of employer contributions was amended to provide for a three-year vesting schedule. These changes would have a major impact on employee benefits.

In summary, the past practice under the contract was that any amendments enacted by the Board of Governors of the American National Red Cross to the Retirement System and the 401(k) Savings Plan would automatically apply to the members of the bargaining unit. The facts in the instant case are therefore similar to the facts in *Post Tribune*, supra, where a change in employee benefits was effected, not by an employer decision, but by a body *dehors* the bargaining relationship. Respondent did not exercise any managerial discretion in closing the Retirement System and in making changes to the 401(k) Savings Plan. The timing of the changes was not subject to the discretion of Respondent but was ruled by decisions of the Board of Governors. Respondent merely passed on the changes to its employees consistent with the past practice between the parties.

I distinguish the facts in this case from those in the recent *E.I. DuPont* cases.[29] In those cases the employers made changes pursuant to a contractual management rights provision during a hiatus between contracts. The Board found the unilateral changes were unlawful because the contractual authorization had ceased to be effective. In the instant case, the past practice was not premised on the language of a contract clause granting management the right to make unilateral changes.

I conclude the Respondent did not violate the Act when changes were made to the Retirement System and the 401(k) Savings Plan.

B. Requests for Information Related to Health Insurance Benefits

The General Counsel frames the issue related to the Union's information requests as:

> Whether Respondent unlawfully failed to provide information to the Union that had been requested since August 30, 2009, or, in the alternative, assuming *arguendo* that it could be found that Respondent provided sufficient information to the Union on December 17, 2009 or on February 18, 2010, Respondent unlawfully delayed in providing information in violation of Section 8(a)(5) of the Act.

I note that Respondent provided all the plan documents requested by Lockhart at the commencement of negotiations. The Complaint does not make any allegations relating to the Union's February 13, 2009 request for information. This request resulted in the February 20, 2009 email from Strouse to Lockhart stating that the information relating to a large claim report, a medical and prescription drug utilization report and a monthly claim report for Connecticut was "not available" because there were no reports for the Region as a whole or for the bargaining unit. There were other requests for information in the spring of 2009 and the employer's compliance in those instances is not at issue herein.

As is described above, on August 30, 2009 the Union announced a major change in its bargaining position concerning medical insurance. Rather than continuing to demand a fully insured plan similar to the plans that had been in effect for Connecticut Region employees in the past, the Union was now prepared to negotiate within the Benefits Advantage structure. With

[29] *E.I. DuPont*, 355 NLRB No. 176 (2010); *E.I. Dupont*, 355 NLRB No. 177 (2010).

this end in mind, Lockhart asked Strouse about his authority to negotiate a medical plan. Strouse affirmed that he had full authority to negotiate for the Connecticut Region.

Referring to the July 27, 2009 document provided to the Union to show the planned 2010 changes in the Benefits Advantage plan, Lockhart asked Strouse what cost savings were represented by each change from the 2009 Benefits Advantage plan then in effect. Lockhart furnished Strouse with examples of the type of information he sought and he told Strouse that he needed the information on a line-by-line basis in order to prepare a new insurance proposal. The information requested on August 30 did not involve the same type of data as had been requested on February 13, 2009. Strouse replied that he would look into the matter. Strouse's response on September 29 was that the American National Red Cross has not attempted to measure costs on a line-by-line basis. Strouse asserted that it would be cost prohibitive to change the co-pays for the bargaining unit; to set up and administer a different plan would cost $100,000.

On October 18, the Union renewed its request through the mediator for line-by-line cost savings resulting from the 2010 changes to the Benefits Advantage plan. Strouse replied that the employer was working on the request and again raised the $100,000 figure as the cost of making changes to Benefits Advantage. When Lockhart asked whether this was the cost for a change in the Connecticut Region only or whether this represented a nationwide cost due to requests by other unions for changes in the medical plan, Strouse said he did not have an answer. Strouse testified with respect to the request on this date that negotiating line-by-line costs would not lead to an agreement because the Connecticut Region did not want such a result. CEO Sullivan wanted all the employees to be in the same medical plan.

On November 15, 2009 the Union attempted to negotiate line-by-line some of the changes contemplated in the medical plan for 2010. The Union explained that it needed cost information to respond to most of the items. The Union gave Respondent a document showing where the parties stood on the 2010 Benefits Advantage plan and showing what information had not been received by the Union. Strouse again told the Union that it would cost $100,000 to set up a plan for the bargaining unit, but he did not give Lockhart an answer when asked for details about the $100,000 figure.

When Suflas came to the table beginning on December 6, 2009 Lockhart reiterated his request for a line-by-line listing of the savings to be realized by the 2010 changes to Benefits Advantage. Lockhart testified that he asked Suflas for the information he had previously requested of Strouse: cost savings on the national, regional and unit level. Lockhart told Suflas that the Union wanted to negotiate within the Benefits Advantage plan. Suflas said he would look into the request for information. The next day Suflas wrote to Peterson asking for "line by line projected savings" calculated at the Regional level and at the national level. That day, Burroughs informed Peterson and Shearer that the savings on a national basis were readily available but that the cost figures solely for Connecticut could not be provided. By January 11, 2010 Hewitt associates had calculated a $25,000 cost to obtain the data broken out for Connecticut; however, the Union was not informed of this possibility.

I note that Shearer said she was aware in the fall of 2009 that the Union requested the costs savings associated with each item of Benefits Advantage for 2010. She was not aware that the Union had asked for the information starting in August 2009.

As described above, Shearer did not testify that the line-by-line cost savings information requested by the Union did not exist for the national plan; she said only that it did not exist for the Connecticut Region as a discrete entity. Indeed, Shearer's testimony about the steps

necessary to set up a medical insurance plan, including the hiring of actuaries to price the expected cost, convinces me that those who designed the self-insured plan for the American National Red Cross had to have made calculations that included the cost of each element of the plan on a line-by-line basis. It strains credulity to believe that the plan, which was intended to help deal with the National's budget problems by achieving economies of scale and cutting costs generally, was designed without projecting the cost of each element of the plan. Without resort to the calculations of actuaries and other experts, the plan designers could not have known that any of the changes in 2010 would significantly help the bottom line. I do not believe that the plan designers merely looked to the heavens and picked a number willy-nilly for the amount the 2010 plan would pay for hospitalization or a lab test or a doctor visit or any other element of Benefits Advantage.

I find that on August 30, 2009 Lockhart did not confine himself to a request for cost savings solely for the Connecticut Region and the bargaining unit. Although Lockhart testified on cross examination in response to a leading question that he asked for Connecticut regional and unit information, he was not asked, and he did not deny, that he wanted the national information too. Further when Suflas entered the negotiations and Lockhart specifically asked him for the information the Union had requested in the past, this request clearly encompassed cost savings on a national basis. Suflas understood the request to include national, regional and unit cost savings information. Suflas did not testify that the Union had never before requested the national information.

The conclusion is inescapable that the line-by-line Benefits Advantage cost savings information requested by the Union on August 30 was always available on a national basis but that Strouse took no steps to provide it to the Union because, in his opinion, the information would not lead to an agreement. It is clear that Shearer was not asked for the information after the Union's August 30 request for information. Moreover, no documents show what steps, if any, Strouse took to obtain the August 30 information requested by the Union. Strouse's September 29 statement that the National Red Cross had not attempted to measure costs on a line-by-line basis was ambiguous. Since it immediately preceded a discussion about the undesirability of creating a separate plan for Connecticut, the reply could be read as applying only to costs in Connecticut. If the assertion is read to apply to Benefits Advantage on a national basis, the response was not accurate. As confirmed by Burroughs to Peterson and Shearer on December 8, 2009, Burroughs could readily obtain the projected cost savings line-by-line for each change in the plan calculated at the national level. And, as Shearer testified, the type of information relating to cost savings on a national level was just the type of data looked at by actuaries and plan designers when examining design changes year after year.

Even after Suflas entered the negotiations and followed up the Union's request, the full national line-by-line cost savings information was not provided to the Union. The December 17 spreadsheet contained information about 12 items although there were over 100 items on the 2010 Benefits Advantage design document given to the Union. As noted above, Respondent presented no testimony as to who had prepared the spreadsheet or why it contained only 12 items. Shearer did not say that no further information was available. Significantly, Shearer confirmed that the type of information on the spreadsheet is prepared by actuaries to identify the impact of changes on the total cost of a medical plan. The cost data relating to the 2010 Benefits Advantage plan design was the type of data that was used by the actuaries who participated in preparing the 2010 plan.

Indeed, part of the 2010 Benefits Advantage plan design document furnished to the Union on July 27, 2009 showed the 2010 percentage cost sharing between employees and the employer for the medical plan, dental plan and the vision plan and the dollar amounts to be paid

by employees for the coverage available to them. In order to determine the dollar amounts to be paid for the various choices offered to employees in 2010, the designers of the plan had to have made calculations involving just the type of line-by-line cost information requested by the Union on August 30. Benefits Advantage is a self-insured plan so the information is in the possession of the National Red Cross.

Although the Union continued pressing for further information in its letter of January 8, 2010, Suflas responded on February 18 that the December 17 spreadsheet contained "all the information to which the employer has access." Manifestly, this statement referred to the employer in the negotiations, Respondent Connecticut Region, and not the National Red Cross. There is no indication that Suflas or anyone else representing the employer asked the National Red Cross for the additional national line-by-line cost information which Burroughs had stated he could "readily" acquire. Respondent presented no testimony to show why all the readily available national information was not given to the Union.

Lockhart again pressed for the line-by-line information on March 26, 2010, explaining that the Union wanted to negotiate about the design of the health plan. Lockhart pointed out that there were still open requests for 70 items in the Benefits Advantage plan that had not been responded to by the employer. Lockhart explained his request, pointing out that the Union could not intelligently prepare a proposal without the line-by-line information. Suflas asked whether the Union would share the cost of compiling the information, but he did not give the Union the $25,000 estimate cited by Hewitt. I note that the $25,000 applied only to breaking out the Connecticut figures separately; Respondent presented no testimony that there was a significant cost involved to obtain the readily available national figures.

Suflas' testimony about Lockhart's March 26, 2010 request for information was that the employer did not want to make line-by-line changes but the Union wanted the information so it could move cost items around. In effect, Suflas testified that because the company did not want to negotiate line-by-line changes it did not matter that he had not provided the information to which the Union was entitled. Suflas said providing the information would not change the fact that the parties were far apart on what he termed the biggest issue dividing the parties. Indeed, Lockhart shared the view that the medical insurance issue was crucial; he told Suflas on April 25, 2010 that the Union did not want to give up its right to negotiate medical insurance benefits and the Union could not agree to an economic package without knowing the medical plan design.

To sum up, the bulk of the national line-by-line 2010 cost savings information requested on August 30, 2009, October 18, 2009, December 6, 2009, January 8, 2010 and March 26, 2010 was never provided to the Union. Further, the Connecticut regional information was not given to the Union and the Respondent did not inform the Union that the projected cost of breaking out the Connecticut line-by-line information was $25,000. Respondent did not ask the Union whether it wanted to share the stated cost.

It is well established that an employer must provide a union with requested information which is necessary and relevant to the performance of its role as collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Court approved the "discovery type standard" applied by the Board. *Hardesty Co.*, 336 NLRB 258 (2001). Here, the issue of health insurance was of paramount importance to both the Union and Respondent.

The line-by-line information was clearly relevant and necessary to the Union in negotiating the coverage of employees under a health insurance plan. The Union needed the cost information to formulate proposals that would meet the needs of the unit employees while

staying within the cost parameters of the Benefits Advantage plan as designed by the employer. Respondent had an obligation to provide the Union with information about the cost of unit employees' health insurance coverage. *Martin Marietta Energy Systems, Inc.* 316 NLRB 868 (1995).

Respondent does not deny the general proposition that it has a duty to provide the Union with information about health insurance. Indeed, Respondent's defense rests in part on a misreading of the record pertaining to this issue.[30]

Significantly, Strouse's response to the Union's request for information after August 30, 2009 was ambiguous and had the effect of stringing the Union along. When the Union renewed its request on October 18, Strouse replied that the employer was working on the request. Each time the information request was repeated, Strouse adverted to the expense of creating a separate Connecticut insurance plan but he professed ignorance as to the precise details of the purported $100,000 cost he gave the Union. The Union repeatedly asked but it was never told whether the $100,000 represented the cost of a separate plan for Connecticut only or if it combined costs for all the other regions then negotiating for health insurance where the unions may have sought to vary the 2010 Benefits Advantage plan. Similarly, Suflas provided only a small portion of the national information requested and he did not enable to Union to bargain about the cost of producing the Connecticut information. The reason for these failures was made clear by the employer's testimony that providing the information would not lead to an agreement. Respondent did not want to negotiate the line-by-line details and cost of the insurance coverage. Respondent wanted the Union to accept the Benefits Advantage plan as presented by the employer. Respondent did not want the Union to know what amounts were being saved by the changes made in the 2010 Benefits Advantage plan.

Most of the national line-by-line information requested on December 6, 2009 was not provided to the Union. Shearer described the information provided on the December 17 spreadsheet as "aggregated" and there was no explanation why the rest of the information could not be given to the Union. Suflas repeated in his February 18, 2010 letter to Lockhart that the information had been aggregated. Respondent offered no explanation on the record why all the national information described by Burroughs as readily obtainable was never provided to the Union. I find that since August 30, 2009 Respondent has unlawfully failed to provide the Union with the national line-by-line cost savings information relating to the 2010 Benefits Advantage plan.

As to the line-by-line Connecticut regional information which the Union had requested on August 30, 2009, it is well established that a party refusing to provide information bears the burden to show that production of the data would be unduly burdensome. Respondent's witnesses merely testified that the cost would be around $25,000 but Respondent provided no specific or detailed evidence that in the context of these negotiations that amount presented an undue burden to Respondent. If the sum of $25,000 were found to present an undue burden to Respondent, the parties would be required to bargain in good faith as to who should bear the costs. *Tower Books*, 273 NLRB 671 (1984), enfd 772 F. 2d 913 (9th Cir. 1985). Here,

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[30] To correct only a few errors of fact in Respondent's Brief: The information request of August 30, 2009 was for different information than that requested on February 13, 2009; as of August 30 the Union had never been told that the newly requested information did not exist. GC Exhibit 53, the December 17, 2009 spreadsheet, reflects national data and not Connecticut data as is erroneously suggested in fn. 30 of the Brief. The correct name of the insurance consultant referred to in fn. 29 of the Brief is Levarek; the Union president is Lenentine.

Respondent never informed the Union that the cost would be $25,000 and the Union never had the opportunity to bargain over sharing or bearing the cost. As the Board noted in *Tower Books*, "[I]f the Respondent were serious about sending the information, at the very least it would have said what the charges would be…." I conclude that the Respondent has not met its burden to show that the cost of providing the Connecticut information is unduly burdensome. As a result, I conclude that since August 30, 2009 Respondent has unlawfully failed to provide the Union with information as to the Connecticut line-by-line cost savings in the 2010 Benefits Advantage plan.

C. Implementation of Changes to Medical, Prescription and Dental Benefits

The facts relating to the implementation of changes to the unit employees' medical, prescription and dental benefits are not in dispute. The many substantial, material and significant changes in the 2010 Benefits Advantage plan are described in detail above. The parties stipulated that the actual enrollment process for unit employees began on October 26, 2009. Employees were told that their share of insurance costs would be the same as in the expired contract. The changes in insurance benefits pursuant to the 2010 Benefits Advantage plan were implemented on January 1, 2010. The percentage share of the costs paid by employees remained at 2009 levels. The January 1, 2010 changes in benefits were made unilaterally by the Respondent.

Respondent's unilateral implementation of the changes in health insurance benefits constitutes a violation of Section 8(a)(5) of the Act unless Respondent can meet the burden of showing that the changes were privileged. *Caterpillar, Inc.,* 355 NLRB No. 91 (2010). Respondent's defenses are set forth in its December 31, 2009 letter to the Union and in its Brief.

Before dealing with the employer's defenses, I note that Respondent has suggested the Union delayed the bargaining process and was responsible for the failure of the parties to meet frequently or at times convenient to the employer. The Union committee was large and subject to scheduling issues. The Respondent's negotiators were not always available on Sunday, a day when the employees could meet without loss of pay. At various other times the Union committee members could not meet because the employer did not reschedule their work. Further, negotiators on both sides had other commitments. There is absolutely no evidence in the record that the Union improperly delayed bargaining and thereby impeded the process. I reject Respondent's contentions; they do not merit further discussion.

1. Impasse Defense

Respondent contends that the parties were at impasse with respect to the health insurance changes for 2010.

As set forth above, from the moment bargaining for the new contract got under way, Respondent consistently maintained that economic conditions required cost savings in health insurance. Respondent cited budget woes at the American National Red Cross and spoke of the savings to be achieved by placing all regional and chapter employees into a single insurance plan. Respondent told the Union that the Connecticut Region had to cut costs to deal with local competition. In short, Respondent's position as to health insurance and the necessity for the Benefits Advantage plan was all about saving money. The Union engaged Respondent on this level beginning August 30, 2009 when it agreed to negotiate within the framework of the 2010 Benefits Advantage insurance plan. However, the Union wanted to exercise its right to negotiate about the benefits and the costs for unit employees and it sought cost information which I have found above the Respondent unlawfully refused to provide. In view of Respondent's emphasis on the economic desirability of Benefits Advantage the cost information

was central to the parties' negotiations. The Union wanted the information so that it could evaluate the cost of each element and each line of Benefits Advantage and suggest ways to shift costs within the plan in a way that might better suit the needs of unit employees. Respondent's unlawful failure to provide all the information requested by the Union on August 30, 2009, its failure to show that production of the Connecticut portion of the information would be burdensome and its failure to give the Union the opportunity to negotiate about the cost of furnishing the Connecticut information constitute a failure to bargain in good faith.

It is well settled that failure to produce information that is necessary and relevant to negotiations precludes a finding of a good faith impasse in negotiations. The Board has recognized that where the Respondent's financial circumstances are central to the matter under discussion the Union needs to know the cost figures developed by the company. Failure to supply the information precludes the parties from reaching a genuine impasse. *Pertec Computer*, 284 NLRB 810, 811-812 (1987). Thus, I reject the defense of impasse.

2. The Dynamic Status Quo Defense

The Respondent relies, in part, on the line of cases discussed in the Retirement System and 401(k) benefits section above. Those cases begin with the statement in *Katz* that change pursuant to a longstanding practice is essentially a continuation of the status quo. 369 U.S. at 746.

The dynamic status quo defense with respect to health insurance must stand or fall on the history of the particular longstanding practice relied upon by Respondent. The history shows that for many years before each open enrollment period the National Red Cross surveyed available health insurance plans and notified its various entities, including the Connecticut Region, what plans were available and what they would cost. The Connecticut Region would review the new offerings and inform the National Red Cross what options and what premium cost sharing arrangements should be offered to the Connecticut employees. Then the enrollment materials were prepared for the Region's employees. The new insurance coverage began on January 1 of each year.

The choice of insurance plan made each year by the Connecticut Region was circumscribed by the then current collective-bargaining agreement. Therefore, no matter what plans were offered to employees, the percentage cost to be borne by the employer was specified in the contract. Also, in the 2000-2003 and 2003-2006 contracts the types of policies available were specified: HMO, PPO, POS and Delta Dental. Further, because the new collective-bargaining agreements had a term beginning in April or May every three years, the negotiators would be fully aware in great detail of the insurance plan that had already been chosen by the employer for that year. The current year's insurance plan would have been chosen during the term of the expiring collective-bargaining agreement and thus subject to its terms. Each contract from April 1, 2000 through March 31, 2009 contained comparability language applicable to the choice of plans in succeeding years of the contract term. Thus, the Union had effectively negotiated about the type of insurance and choices that would be offered to employees for the next three years. Whatever insurance plan was chosen in the second and third years of the contract it would be comparable on a stated level with the plan in effect during the first year of the contract. Beginning in 2003 the choice of plan in succeeding years of the contract term was made specifically subject to the grievance procedure. This is an enforcement mechanism for the comparability requirement of the contractual provision.

All the collective-bargaining agreements fixed not only the cost-sharing percentages for the next three years but, because the contracts contained comparability language, they also

established a comparability standard for the benefits including types of plans offered, extent of coverage and co-pays. Thus, no changes of great magnitude could be made to the health benefit plans without negotiation and agreement by the Union.

The language of the 2006-2009 contract illustrates this point. It was negotiated after the January 1, 2006 health insurance plan was in place and it requires the employer to "provide health and dental benefits plans … in accordance with the terms of the respective contracts, or substantially comparable plans as determined by the Employer." Thus, whatever plan was chosen to commence on January 1, 2007 it had to be substantially comparable to the insurance plan that was in effect on January 1, 2006. The same was true for the insurance plans to be effective on January 1, 2008 and January 1, 2009.

The record shows that when Benefits Advantage was introduced in 2008 it offered both a standard and premier PPO, an EPO and other types of benefits detailed above. The Union determined that the 2008 Benefits Advantage plan was within the contractual definition of "substantially comparable" as compared to the 2007 plan and it did not file a grievance to contest the provisions of the new plan.

The status quo between the parties, as described above, does not include instances where the Respondent made major changes in health insurance benefits without the agreement of the Union. Before January 1, 2010 changes in health insurance were made pursuant to comparability standards contained in the successive collective-bargaining agreements between the parties. These changes were the product of negotiations between Respondent and the Union. I find that Respondent has not shown that there was a longstanding practice of unilateral changes in health insurance.

I find that the 2010 Benefits Advantage plan implemented on January 1, 2010 made radical changes in the employees' health insurance in terms of the plans available, the benefits and the co-pays. These changes resulted in potentially much greater costs to employees. As detailed above, one PPO was eliminated, co-pays for some doctor visits were more than doubled, some co-pays were changed from stated amounts to percentages of total costs so that employees might be out-of-pocket many thousands of dollars instead the much smaller fixed sums specified in the 2009 plan. There were major changes in the prescription drug coverage and dental coverage.

It is significant that the record contains no testimony on the part of Respondent that the 2010 Benefits Advantage plan is substantially comparable to the 2009 plan. Shearer testified only about the disadvantageous changes made in 2010 as compared to 2009. A continuation of the status quo would require that the employer determine the 2010 plan to be substantially comparable to the previous plan. No witness testified that such was the case.

The changes in the employees' health insurance described above involved the exercise of discretion by the employer. Respondent has not shown that it was lawfully constrained to adhere strictly to the terms of the national plan design for 2010. In fact, when the Union asked Strouse on August 30, 2009 whether Respondent had the authority to negotiate about health insurance, Strouse answered in the affirmative. Suflas gave similar assurances to the Union when he entered the negotiations. As Shearer made clear, various Red Cross regions across the country maintain different health insurance plans in compliance with their respective collective-bargaining agreements. Shearer testified that it was possible for a region to offer health insurance that did not conform to the national plan; a variant plan could be administered under the Benefits Advantage umbrella.

The cases cited by Respondent are inapposite. In *Post Tribune* the change made by the employer was justified by its adherence to an established percentage allocation of the insurance premiums between the employer and the employees. The Board found similar facts in *Courier Journal* where the employer had "regularly made unilateral changes in the costs and benefits of the employees' health care program." 342 NLRB 1094. In the instant case, I have found that no past practice exists of making such unilateral changes to health insurance costs and benefits. In *Courier Journal* the Board found that the employer had exercised no discretion in making the changes at issue. Here, I have found that the Respondent could have continued to offer its employees a health plan that did not conform to the 2010 national plan. Thus, the employer fully exercised its discretion in instituting the national plan on January 1, 2010.[31] *NLRB v. Katz*, 369 U.S. 746; *Our Lady of Lourdes*, 306 NLRB 340.

I conclude that the unilateral effectuation of the 2010 Benefits Advantage insurance was not a continuation of the status quo.

3. The Discrete Recurring Event Defense

The Respondent argues that the Union had notice and an opportunity to bargain about the implementation of the 2010 Benefits Advantage plan but that it declined to bargain. The Respondent concludes that it was privileged to implement the new insurance plan because it was a discrete recurring event under the rule of *Stone Container Corporation,* 313 NLRB 336 (1993).

Bottom Line Enterprises, 302 NLRB 373 (1991), held that when parties are engaged in negotiations an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity bargain; the employer must refrain from any unilateral changes until an overall impasse has been reached on bargaining for the agreement as a whole. *Stone Container* represents an exception to the rule prohibiting unilateral changes during the course of bargaining. In *Stone Container* the parties were negotiating an initial agreement when the employer told the Union that for a variety of reasons it would not be granting the yearly April wage increase. The Union did not make a specific proposal for the yearly increase and did not raise the issue again during negotiations. The Board held that the failure to grant the annual increase was not an unlawful unilateral change:

> [T]he April wage increases here were annually occurring events, and thus bargaining over the amount of such increases could not await an impasse in overall negotiations. Further, the Respondent was not proposing to permanently abandon the April wage increases nor declining to bargain over how much of an increase, if any, it should give…. Rather the Respondent expressed its willingness to discuss the subject, conducted its "annual wage and benefit survey," and proposed giving no wage increase…. Further, while the Respondent made its proposal in time for bargaining over the matter if the Union wished to bargain, the Union made no counterproposal concerning the April wage increase, and did not raise the issue again during negotiations.

The *Stone Container* exception permitting unilateral changes will apply where an annually occurring event takes place during negotiations and where the employer gives notice to the Union of its intention to implement a condition of employment with sufficient time for the Union to bargain, but the Union fails to engage in negotiations over the proposed

[31] Suflas' December 31, 2009 letter giving notice of implementation stated, "The employer has a long-standing practice of exercising its discretion to modify benefits…."

implementation.

The Board discussed the exception in *Brannan Sand and Gravel Co.*, 314 NLRB 282 (1994), where the employer had a history of reviewing its health plan annually and adjusting the benefits to control costs. The Board found a violation in the unilateral implementation of changes in the health plan because the employer had not provided the Union with timely notice and a meaningful opportunity to bargain. In the course of the negotiations the union had presented its own health care proposal which was rejected by the company. The company informed the union that it was studying changes in the existing health insurance plan. Eventually, the company notified the employees of changes in their health insurance and the company implemented these changes. The Board found that by the time the union was informed of the changes in health insurance the employer had already announced them to the employees. Further, the employer's own witness testified that the union had been told "that any discussion over the health plans changes would have been 'fruitless' because the Respondent had no intention of doing anything other than what it planned to do." The Board concluded that the company had presented the union with a *fait accompli.*

Respondent's Brief is replete with references to what it characterizes as the Union's refusal to bargain about health insurance. The evidence is to the contrary. The entire record shows repeated efforts by the Union to negotiate about the 2010 Benefits Advantage plan. Respondent's failure to furnish necessary information to the union has been dealt with above. Even in the absence of the information it would need to negotiate intelligently about the 2010 Benefits Advantage plan the Union attempted to engage Respondent in dialogue about elements of the plan. Significantly, after the employer began the October open enrollment based on the 2010 health insurance changes, the Union continued to demand bargaining over the proposed changes. On November 15, 2009 the Union gave the employer a document showing its position on each change in the 2010 plan. Where the Union did not have enough information to take a position, it asked a question. The employer did not respond to the questions. Strouse testified that negotiating line-by-line would not get an agreement. Suflas stated that the company did not want to make line-by-line changes to the medical plan but the Union wanted cost information so that it could move cost items around. The meaning of this evidence is that Respondent did not want to vary the 2010 plan and so did not wish to negotiate about the line-by-line costs of health insurance. I reject any suggestion that it was the Union, rather than Respondent, that impeded negotiations about health insurance.

The facts in the instant case are remarkably similar to the facts in *Brannan Sand and Gravel*. The Union herein proposed a number of approaches to health care insurance during the negotiations. Even before the 2010 Benefit Advantage provisions had been decided upon by the National Red Cross and had been given to the Union, Respondent made it clear that it was insisting on the 2010 Benefits Advantage plan. On April 26, 2009, Strouse told the mediator that the parties were at impasse on the medical issue even though the Union had never been shown any details of the 2010 insurance plan relating to coverage, co-pays and cost-sharing. After the plan design was available, Respondent's reason for failing to furnish requested information to the Union was that bargaining about the details of the 2010 Benefits Advantage plan would not get an agreement, that is, it would be fruitless.

On October 5, 2009 Lockhart asked that the employer not make unilateral changes to health care benefits, citing the Union's right to negotiate. Strouse replied that open enrollment would commence on October 26 but there would still be time for the parties to reach agreement on benefits and premium cost sharing. Even after Respondent conducted open enrollment among the employees for the 2010 plan the Union still attempted to negotiate about insurance. As the end of 2009 drew nearer and the parties had not reached agreement, the Union asked

whether the employer intended unilaterally to implement the changes in health insurance. Finally, on December 31, in a letter received by the Union on January 4, 2010, the employer announced implementation on January 1. In effect, there was no notice of Respondent's intention to implement the changes in the employees' health insurance.

Respondent has not shown that it was forced by any January 1 deadline to implement the changes in health insurance. The Benefits Advantage plan is self-insured and, as Shearer testified, a variety of health insurance plans mandated by collective-bargaining agreements are administered under the Benefits Advantage plan for Red Cross regions throughout the country. Indeed, Suflas told the Union that he had full authority to negotiation a different plan from the 2010 Benefits Advantage plan. There is no evidence in the record to show why the 2009 plan could not have been kept in force until the parties had come to an agreement or reached a lawful impasse. Although during the negotiations the employer told the Union it would cost $100,000 to have a different plan for the Connecticut Region, there is no testimony as to what that means. Despite the Union's repeated requests the employer never explained how that figure was arrived at. Shearer identified that figure as the cost of designing a new plan from the ground up. There is no evidence as to the actual cost of keeping the 2009 plan in place for the unit employees. Respondent presented no evidence that, absent implementation of the 2010 changes, the unit employees would have been left without any health insurance coverage.

Significantly, Suflas testified that the "decision" to implement the 2010 changes was made in "late December," thus belying any claim that Respondent had no choice and was forced by outside circumstances to implement changes in the existing health insurance coverage for unit employees.

To the extent that Respondent relies on cases such as S*tone Container* and *TXU Electric Co.*, 343 NLRB 1404 (2004), and similar cases cited in its brief, those decisions are not applicable here for an additional reason. The Board stated in *TXU Electric* that *Stone Container* stands for the proposition that "where … a discrete event occurs every year at a given time, and the negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event." 343 NLRB 1407. Of course, the parties here were not bargaining a first contract.[32]

Respondent's Brief castigates the Union for participating in a coalition with other unions representing various Red Cross regions also engaged in negotiations. Respondent's criticism is misplaced. The record shows that throughout the negotiations between Respondent and the Union, the employer's representatives bombarded the Union with claims about the dire financial condition of the National Red Cross, all the while denying that the Region itself was asserting inability to pay. When McGovern addressed employees directly about austerity measures that would be applied to them, it was as CEO of the National Red Cross. It was also McGovern who first alerted employees that their medical insurance would change to their disadvantage. Finally, throughout the negotiations, Respondent informed the Union that it was imperative for all employees to be covered by the same nationally designed insurance plan. Other unions

[32] In *Nabors Alaska Drilling*, 341 NLRB 610 (2004), where the parties were bargaining an initial contract, the ALJ found that the Union had delayed unduly in requesting bargaining after it received notice of proposed changes in health insurance co-pays. In *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542 (2004), the Board found that the parties were at impasse over the employer's health insurance proposal while negotiating an initial contract. In *Bell Atlantic Corp.* 336 NLRB 1076 (2001), a case not involving an initial agreement, the ALJ found that the Union did not act with due diligence in requesting bargaining on a relocation of unit work.

which were then bargaining with Red Cross regions were getting the same message; indeed, Strouse was involved in some of these negotiations. In the face of these events, it was not unexpected for the Union to conclude that the National Red Cross was determining the bargaining and it is not surprising that this Union joined with other unions in an attempt to deal directly with someone at the national level. Nor is there any validity to Respondent's complaints that the Union was receiving technical assistance about the intricacies of medical insurance from the AFL-CIO. Respondent's argument that the union coalition had a malign effect on the instant negotiations is not supported by any hard evidence. It is clear from the record that the Union herein was focused on obtaining a contract with the Respondent.

Similarly, I do not agree with Respondent's contention that the Union's health insurance proposals were regressive to the point of impeding negotiations. After it was clear that the Union would not be able to regain a fully insured plan such as the employees had enjoyed in the past, the Union tried to bargain within the Benefits Advantage plan. Even without the cost information to which it was entitled and which the employer had unlawfully failed to turn over, the Union made repeated attempts to bargain for health insurance. Respondent's Brief faults the Union for asking for more than the employer was willing to give in the matter of health insurance and the Respondent berates the Union for refusing to agree to the me-too language it was insisting upon. I note that while the Union was trying to maintain insurance benefits for its members it was steadily scaling down many of its demands on wages and many other conditions. The Union was making movements in other areas while trying to preserve as many benefits as possible in the area of health insurance. This is not evidence of regressive bargaining.

4. The Waiver Defense

I note that page 49 of the Respondent's Brief on the medical insurance issue purports to quote from the 2006-2009 collective-bargaining agreement, but in fact the Brief puts into quotation marks language that is not in the contract as entered into evidence. Thus, Respondent's Brief makes an argument based on incorrect language which it presents as the language agreed upon by the parties. The quoted language in Respondent's brief differs greatly from the provisions of the actual 2006-2009 labor contract that is the central document at issue herein.

The 2006-2009 collective bargaining agreement, quoted in full above, provides

> Section 14.2 For the duration of this Agreement, the Employer will provide health and dental benefits plans for employees and their dependents in accordance with the terms of the respective contracts, or substantially comparable plans as determined by the Employer. ...
>
> Section 14.3 Any grievance about whether a benefit plan is substantially comparable can be filed at the second step.

Respondent urges that the collective-bargaining agreement contains a waiver of the Union's right to bargain over health benefits. Respondent argues that the waiver is clear and unmistakable and that, based on the bargaining history between the parties, the Union consciously yielded its interest in the matter of health insurance benefits. The Respondent relies upon what it terms a past practice of unilateral change in health benefits.

It is axiomatic that a waiver does not survive expiration of the contract in which it is contained in the absence of evidence of the parties' contrary intentions. *Long Island Head Start*

Child Development Services, 345 NLRB 973 (2005). The language of the collective-bargaining agreement permitting the Respondent to determine a substantially comparable plan is limited to "the duration of the agreement." If this language is read to constitute a waiver, it expired on April 26, 2009, long before the January 1, 2010 implementation of the new Benefits Advantage plan. Further, the waiver would be limited to imposition of a "substantially comparable" plan. As set forth above, Respondent presented no evidence that the 2010 Benefits Advantage plan was substantially comparable to the 2009 plan. Indeed, the testimony of the employer's witnesses established that the 2010 plan was a major departure from the 2009 plan.

Respondent's brief argues the "substantially comparable" language actually means that the employer could change benefits so long as "they were not arbitrary or capricious." There is no support in the record for this variation to the words set forth in the contract. In fact, the bargaining history shows that the parties engaged in vigorous negotiations over the wording of the contract language and I find no reason to vary the language they set down in black and white. The plain meaning of the collective-bargaining agreement is that if the American National Red Cross amends Benefits Advantage so that it is no longer substantially comparable to the "respective contracts" referenced in the collective-bargaining agreement, the employer must continue the status quo by giving the employees a plan that meets the contractual mandate.

As set forth in detail above, I have found that there is no past practice of unfettered unilateral changes made by Respondent concerning health insurance benefits. The collective-bargaining agreement permitted the employer to make changes during the life of the contract based on the comparability language and subject to the grievance procedure; the history of the parties' dealings up to 2009 shows that the Respondent adhered to the contractual comparability mandate.

Respondent's Brief on this waiver issue relies heavily on the bargaining history: that history shows that the Union was always intent on preserving its rights to bargain and grieve the subject of health insurance and the Union never agreed to language that would give up those rights. Respondent's argument that it is a continuation of the status quo to impose a wholesale waiver of the Union's right to bargain about health insurance, including the denial of the right to demand any health insurance, requires a nullification of the collective bargaining process between the parties.

Finally, Respondent argues that the Union is bound by the "American Red Cross Benefits Advantage Plan Summary Plan Description." This undated document contains a paragraph reserving to the American Red Cross the right "to at any time change or terminate benefits … amend or eliminate any other plan term or condition, and to terminate the whole Plan or any part of it at any time, for any reason. … No consent of any participant is required to terminate, modify, amend or change the Plan." Respondent implies that it would be a continuation of the status quo to apply this reservation of rights to the unit employees' health insurance benefits after expiration of the contract.[33]

The import of the Respondent's argument is that despite the provision in the collective-bargaining agreement setting forth the Respondent's promise to provide health insurance for "the duration of the Agreement" comparable to "the contracts" referenced in the 2006-2009 agreement, that bargained for promise is voided if the American National Red Cross terminates

[33] The fact that this document is undated is significant. Since Respondent's Brief has apparently substituted another contract for the actual 2006-2009 collective-bargaining agreement, it is possible that this document does not apply to any relevant period.

Benefits Advantage or makes substantial changes to the plan. Indeed, this is the result that Respondent wished to achieve in bargaining: the employer's proposals for changing Article XIV to provide "me-too" language that would guarantee unit employees equal treatment with non-unit employees would have permitted any type of change to health insurance, including no health insurance.

In support of its view that the collective bargaining agreement "accepted the plan documents" of Benefits Advantage, including the right to amend and terminate the plan, Respondent cites *BP Amoco Corp. v. NLRB,* 217 F. 3d 869 (D.C. Cir. 2000*).* In that case the court reversed a Board finding as to the meaning of certain labor contracts. The court found that the collective-bargaining agreements incorporated by reference the reservation of rights clauses in the medical insurance plans that permitted amendment and termination. The court found no unfair labor practices where the employer changed the nature of the medical coverage offered to employees after declaring an impasse in the negotiations. The court relied on the specific language of the contracts: one set of contracts mentioned the medical plan by name and referenced the plan booklet; the other set of contracts referred to "Company" benefit plans. The court found that language of the contracts explicitly made the company medical plans a part of the collective-bargaining agreements.

In the instant case, the collective-bargaining agreement refers to "the contracts", but those were the contracts in force when the agreement was entered into in 2006. Those contracts were fully insured plans subject to Connecticut mandates. There is no evidence about any reservation of rights clauses in those plans nor is there any evidence that the reservation of rights clause relied upon in the Benefits Advantage plan is substantially comparable to any language in the contracts referred to in the collective bargaining agreement.

I find that the language of the collective-bargaining agreement referencing "the respective contracts or substantially comparable plans" is binding on Respondent. I do not find that the collective-bargaining agreement embodies the broad waiver of the Union's right to bargain that is urged in Respondent's Brief.

I find that Respondent violated the Act when it unilaterally instituted the 2010 Benefits Advantage plan for unit employees.

D. Discontinuance of Long Term Disability Insurance for Part-time Employees

It is undisputed that Respondent discontinued long term disability insurance for part-time unit employees on January 1, 2010; there had been no notice to the Union and no negotiations on this subject. Employees were notified of this change by letter dated January 13, 2010.

Respondent's Brief states: "just as it did for employees' health and other benefits on January 1, 2010, the Region was compelled to implement plan changes to its employees' long term disability benefits for new plan year."(sic) Respondent does not dispute that long term disability insurance is a mandatory subject of bargaining nor does Respondent dispute that Article XIV, Section 14.1 of the expired collective-bargaining agreement entitles the unit employees to "the same long term disability insurance coverage which is currently provided, or substantially comparable coverage…."

I find that Respondent unlawfully discontinued the long term disability insurance for part-time employees unilaterally, without notice to the Union and an opportunity to bargain.

E. Overall Conduct Constituting Bad Faith Bargaining

1. Bargaining with a Fixed Intent to Impose Contract Proposals and Practices

The General Counsel alleges that Respondent bargained with a fixed intent to impose its contract proposals and practices, including its proposals and practices concerning Article XV Retirement and Article XIV Insurance. I have found above that Respondent did not violate the Act by unilaterally implementing changes to the Retirement System and the 401(k) Savings Plan.

With respect to the negotiations concerning health insurance, General Counsel urges that the employer's actions constitute more than hard bargaining or legitimate adherence to a strongly held position. I agree.

From the first session in February 2009, Respondent proposed that the Union agree to accept the same National Red Cross group health insurance that would be provided to non-unit employees even though Respondent could not tell the Union anything at all about this insurance. Strouse testified that his goal was to have "complete me-too" contract language for health insurance. Throughout the negotiations, Strouse reiterated that all the Regions must be on the same plan. Similarly, from the first day that Suflas joined the bargaining he said that all the employees had to be in the same medical plan. Indeed, National CEO McGovern addressed the employees directly in a memo on April 2, 2009 telling them that there would be "upcoming changes in health insurance plan … to reduce benefit costs." This signaled that employees and the Union had no choice but to leave the design of the plan to the American National Red Cross.

I have described above that Strouse claimed the parties were at impasse on April 26, 2009, yet the Respondent had not given the Union any information about the Benefits Advantage plan that the employer was insisting upon. Indeed, the employer claimed not to know any details of this plan at the same time that it was pressing the Union to accept it. I have found above that the employer failed to provide information to the Union which was relevant and necessary to the Union's duty to bargain about health insurance. One of the reasons given by the Respondent for its failure to provide the information was that designing a different plan with the Union would involve costs of $100,000, but when questioned about this amount, the employer would provide no details to connect the figure to the Union's demands to negotiate terms for the unit employees.

On November 15, 2009, after the provisions of the 2010 Benefits Advantage plan were made available, the Union gave the employer a detailed response to the various provisions and sought to negotiate, but the Respondent refused to enter into the discussion. Respondent never engaged with the Union about the costs to employees and the employer or the savings represented by various elements of the plan. Respondent refused to discuss the Union's desire to change features of the plan even when the Union asked for the cost of those features so that it could preserve the over-all economic design of the plan.

I have described above the statements of both Strouse and Suflas that providing information to the Union would not lead to an agreement because the employer did not want to negotiate about the costs or any features of the 2010 Benefits Advantage plan. Suflas made it clear throughout the negotiations that the employer did not want to make any changes to the Benefits Advantage medical plan. It is plain that the only position that would lead to an agreement, in the view of both of Respondent's chief negotiators, was the Union's complete

agreement to whatever health insurance plan the National Red Cross wished to impose nationwide.

In *Endo Laboratories, Inc.,* 239 NLRB 1074, 1075 (1978), the Board found the employer did not bargain in good faith when it used a "take-or-leave-it" tactic with respect to health insurance. The employer sought agreement on health benefits but the cost was not yet specified, and the employer "indicated that it was not at liberty to make changes in the package as presented …there could be no discussion concerning its contents." The Respondent took a similar position here.

In *Day Automotive Group,* 348 NLRB 1257 (2006), the Board found a violation where the employer adamantly insisted upon the Union's acceptance of its healthcare proposal. Chairman Battista wrote separately to emphasize that the employer's chief negotiator conceded that from the onset he took the position that the union had to accept the healthcare plan, the plan coverage was absolute and the employees had to take the same benefits and pay the same premiums as everyone else. The employer never gave the union any opportunity to bargain about the plan and it adamantly refused to consider the union's alternative healthcare proposals. Those facts are the same as the facts in the instant case. Although both Strouse and Suflas gave lip-service to their willingness to negotiate about health insurance, when it came to the Union's desire to engage in the normal give and take of negotiations both Strouse and Suflas refused to take up the discussion.

Further, the employer's Article XIV proposals quoted above show that it never abandoned its stated purpose of a "complete me-too" arrangement. Despite moving some language around and adding some provisions applicable for one year only, Respondent made it clear that it would never agree to any contract that did not give it unfettered control over health insurance, including removing the subject from the grievance procedure.

Finally, Respondent conducted open enrollment among the unit employees for the 2010 Benefits Advantage plan in the fall of 2009 while the parties were still negotiating about health insurance. A continuation of the status quo would have meant retaining the 2009 plan then in effect until the parties reached agreement or a lawful impasse. Enrolling the employees in the new plan showed that Respondent had a fixed intent to impose its health insurance proposals.

I find that Respondent bargained with a fixed intent to impose its contract proposals with respect to unit employees' health insurance coverage. This is evidence of bad faith bargaining.

2. Insistence Upon Extreme, Harsh and Predictably Unacceptable Proposals

The General Counsel asserts that Respondent's position on the subjects of the Retirement System, the 401(k) Savings Plan and health insurance were harsh, extreme and predictably unacceptable to the Union. I have found above that the unilateral changes to the Retirement System and the 401 (k) were not unlawful.

The Board has found that a proposal that "vested complete control in the employer on the setting of wages while offering little more than the status quo in return, was significant evidence of an intent to frustrate agreement, and in conjunction with other indicia of bad faith, violated Section 8(a)(1) and (5) of the Act." *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1220 (2001). The Board listed the factors that show bargaining with no real intent to reach a collective-bargaining agreement. These were:

"The [employer's] final proposal vested in the [employer] exclusive control over the

critical subject of wages and eliminated entirely the Union's role in negotiating wages for unit employees, thus precluding bargaining on the most important issue in negotiations and eviscerating the Union's representational function." …. "The [employer's proposal] … removed the subject of wages from the contract's grievance and arbitration procedures altogether and barred strikes over all subjects…." The proposals effectively permitted unilateral reduction of compensation without restriction. "Despite repeated requests from the Union for information and explanation about how the wage proposal would work, the [employer] stubbornly refused to offer any details…." 333 NLRB at 1221 The Board also pointed out that the employees would have fewer rights under the proposed contract than they would have if there were no contract at all.

The subject of medical insurance is hardly less important than that of wages. It is common knowledge that insufficient medical insurance or a lack of medical insurance can cause the accumulation of insurmountable debts and lead to the loss of one's home, car and other possessions. The failure to obtain medical care because of insufficient insurance or lack of insurance can lead to loss of health and the loss of the ability to work. Lack of proper health insurance with which to obtain recommended diagnostic tests and subsequent care can lead to death. Indeed, the Board has recognized that health insurance is equally as important as wages in construing bargaining proposals that reserve sole discretion to management about health insurance plan design, level of benefits, administration and costs. *KSM Industries Inc.*, 336 NLRB 133, 135 (2001).

The Respondent's negotiating stance in the instant case is remarkably similar to that of the employer in *Liquor Industry Bargaining Group*. The Respondent's health insurance proposal would give it complete control in designing the employees' health insurance and would not prevent Respondent from degrading the insurance or even ceasing to provide any health insurance in the year after the proposed contract was signed. Under Respondent's proposal the Union would have no voice in determining what health insurance to provide to the employees or even whether Respondent would provide any health insurance. Further, the subject of health insurance would be removed from the grievance and arbitration procedure. Additionally, the employees would have no right to strike over the issue of health insurance. Finally, despite repeated attempts by the Union herein to obtain information about the costs and savings in the proposed 2010 Benefits Advantage plan, the employer did not comply with its duty to provide such information.

Nor can it be said that Respondent offered the employees any benefits to compensate for its demand that the Union give up the right to negotiate about their health insurance. Respondent offered a wage freeze to be followed by small increases and the eventual disappearance of step increases for those not at the maximum for their title. Whatever the merits of this position might be, it was not of a nature sufficient to compensate for the total abdication of the right to negotiate over health insurance, including the right to determine whether the employees would have any health insurance.

Given the history of the parties' negotiations over health insurance from at least 2003 it is reasonable to say that Respondent would know in 2009 that its health insurance proposal would be unacceptable to the Union. Strouse testified that during the 2003 negotiations the Union rejected what he called "a complete me-too" proposal which would have given the employer complete control over the choice of health insurance and would have permitted the employer to offer no health insurance. Strouse testified that the employer's aims in 2006 were the same. Respondent proposed "me-too" language and proposed removing the issue of health insurance from the grievance procedure. According to Strouse the Union rejected this approach because the Union did not want to give the employer *carte blanche* to change health insurance.

The Union wanted to maintain its right to negotiate over health insurance. Strouse testified that the Union informed him that the me-too language would be extremely difficult to accept. Indeed, the Union opened the 2009 negotiations by demanding bargaining over a new health insurance plan and expressing its dissatisfaction with the 2008 introduction of the Benefits Advantage plan. The Union asked for language that would permit it to participate in decisions about annual health insurance changes during the life of the future contract.

I find irrelevant Respondent's observation that other unions representing employees of other regions or chapters of the American National Red Cross may have accepted language similar to that proposed to the Union herein. Respondent was negotiating with this Union, in this Blood Services Region and the negotiations were subject to historical and economic factors peculiar to the Connecticut Region's unique set of circumstances.

I reject the argument in Respondent's Brief that the employer was merely seeking language with the same import as the health insurance provisions contained in the prior collective-bargaining agreements. The contention is risible and it is contrary to the sworn testimony of both Strouse and Suflas. If, as the Brief contends, the employer's proposals "merely sought to restate language … that the Union had agreed to and abided by during the previous seven years" the employer could merely have agreed to keep the language of the prior contract.

I conclude that the Respondent's health insurance proposal was harsh, extreme in nature and predictably unacceptable to the Union. Combined with the Respondent's unlawful refusal to provide the information requested by the Union and its unlawful unilateral changes in terms of employment, the Respondent's continued insistence upon the health insurance proposal is evidence that the employer was not negotiating in good faith with a view to reaching agreement with the Union.[34]

3. Failure to Cloak Respondent's Representatives with Authority

The General Counsel asserts that Respondent's chief negotiators did not have the authority fully to negotiate a contract because they did not display the ability to discuss variances from the National Red Cross plans for medical insurance and retirement benefits. As discussed above, I have not found a violation with respect to Respondent's unilateral actions with respect to the Retirement System and the 401(k) Savings Plan.

General Counsel urges that the American National Red Cross was "calling the shots" in the negotiations about health insurance as evidenced by McGovern's April 2, 2009 letter to employees stating that health benefits changes will go into effect on January 1, 2010. However, both Strouse and Suflas told the Union they had the authority to negotiate about health insurance. Shearer testified that if required by the terms of a collective-bargaining agreement a health insurance plan that differed from the 2010 National Red Cross plan could be administered under the Benefits Advantage umbrella.

In *Wal-Lite Div. of U.S. Gypsum,* 200 NLRB 1098, 1100 (1972), cited by the General Counsel, the company lawyer formulated and directed the negotiating positions but he was not

[34] Compare the criteria listed in *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984), which include unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining and would have included refusal to furnish information if the facts in the case had supported such a finding.

present at the sessions. The Board found that the company representative who was present at the bargaining table had no authority to compromise on arbitration, checkoff, seniority and many other mandatory subjects of bargaining and the Union was informed of this stance in no uncertain terms. Further, the company lawyer had informed the Union that he would be fired if he agreed to vary the company's position on such mandatory subjects. The facts in the instant case are not similar.

On the evidence before me I decline to find that Strouse and Suflas did not have sufficient authority to negotiate with the Union.

Conclusions of Law

1. American Federation of State, County and Municipal Employees, Local 3145 of Council 4, is the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> Reference technologist, component laboratory technician, Q & L technician, Red Cross head nurse, Red Cross assistant head nurse, Red Cross nurse (RN or LPN), blood services nursing technician (BSNT), Red Cross nurse (HAS). Pherisis head nurse, pheresis staff nurse (RN), blood services apheresis technician (BSAT), unit driver-technician, driver-SCU, packer/loader, technician, technician/driver, mechanic, central supply technician; excluding supervisors, pheresis scheduler, students, students training in blood banking, professionals (other than pheresis RN's), and excluding all other employees including all office or clerical employees, guards, professional employees (other than collection department and pheresis non-supervisory RN's), full-time students (e.g. cooperative work students, SBB students, residents in training and non-blood services employees in training).

2. By failing and refusing to provide information to the Union concerning all the national line-by-line cost savings of the 2010 Benefits Advantage plan, Respondent has violated Section 8(a)(1) and (5) of the Act.

3. By failing and refusing to provide information to the Union concerning the Connecticut line-by-line cost savings of the 2010 Benefits Advantage plan Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By unilaterally instituting the 2010 Benefits Advantage plan for unit employees, thereby making changes in the employees' health insurance benefits for medical, dental and prescription coverage, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally discontinuing long term disability insurance for part-time employees, Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unlawfully refusing to provide information, by making unilateral changes, by bargaining with a fixed intent to impose its contract proposal for health insurance coverage and by insisting upon a health insurance proposal that was harsh, extreme and predictably unacceptable to the Union, Respondent failed to negotiate in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found above that the changes made to the employees' health insurance and to long term disability insurance for part-time employees were unlawful. The Benefits Advantage plan is a self-insured plan which can accommodate required local variations. Therefore, Respondent will be ordered to reinstate the 2009 Benefits Advantage plan for the unit employees and the long term disability insurance plan for part-time unit employees and to make the employees whole for all losses resulting from the changes in benefits and employee costs from January 1, 2010 until such time as the Union and Respondent agree to a change in the health insurance or an impasse is reached in negotiations between the parties as provided in *Ogle Protection Service,* 183 NLRB 682 (1970), with interest computed as prescribed in *New Horizons for the Retarded,* 282 NLRB 1173 (1987), and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

The Respondent, American Red Cross Blood Services, Connecticut Region, Farmington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the information requested by the Union on August 30, 2009 concerning all the national line-by-line costs savings of the 2010 Benefits Advantage plan.

(b) Failing and refusing to provide the information requested by the Union on August 30, 2009 concerning the Connecticut line-by-line costs savings of the 2010 Benefits Advantage plan.

(c) Unilaterally changing the employees' health plan benefits and employee costs for the benefits.

(d) Unilaterally discontinuing long term disability insurance for part-time employees.

(e) Failing to bargain in good faith with the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the information requested by the Union on August 30, 2009 concerning the national line-by-line cost savings of the 2010 Benefits Advantage plan and provide the Connecticut line-by-line cost savings of the 2010 Benefits Advantage plan.

(b) Reinstate the 2009 Benefits Advantage plan for the unit employees.

(c) Reinstate the long term disability insurance for part-time unit employees.

(d) Make employees whole in the manner specified in the Remedy section of the Decision for all losses they incurred by reason of Respondent's changes in its health plan benefits and employee costs for health plan coverage, and make employees whole for the losses they incurred by reason of Respondent's changes in long term disability for part-time employees.

(e) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) Within 14 days after service by the Region, post at its facilities in Farmington and Norwalk, Connecticut, copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[36] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., August 24, 2011.

_____
Eleanor MacDonald
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain in good faith with American Federation of State, County and Municipal Employees, Local 3145 of Council 4 for the following unit of employees:

Reference technologist, component laboratory technician, Q & L technician, Red Cross head nurse, Red Cross assistant head nurse, Red Cross nurse (RN or LPN), blood services nursing technician (BSNT), Red Cross nurse (HAS). Pherisis head nurse, pheresis staff nurse (RN), blood services apheresis technician (BSAT), unit driver-technician, driver-SCU, packer/loader, technician, technician/driver, mechanic, central supply technician; excluding supervisors, pheresis scheduler, students, students training in blood banking, professionals (other than pheresis RN's), and excluding all other employees including all office or clerical employees, guards, professional employees (other than collection department and pheresis non-supervisory RN's), full-time students (e.g. cooperative work students, SBB students, residents in training and non-blood services employees in training).

WE WILL NOT refuse to provide information to the Union which is necessary and relevant to its role as collective-bargaining agent.

WE WILL NOT make unilateral changes to your health plan benefits and costs and to long term disability insurance at a time when no lawful impasse in bargaining has been reached.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit described above.

WE WILL provide the information requested by the Union concerning our health insurance proposal.

WE WILL reinstate the 2009 Benefits Advantage plan for unit employees and WE WILL reinstate long term disability insurance for part-time unit employees until a lawful impasse is reached or a collective-bargaining agreement is concluded with the Union.

WE WILL make our employees whole for the losses incurred by reason of our unlawful changes in health plan benefits and costs and changes in long term disability insurance for part-time employees.

American Red Cross, Blood Services, Connecticut Region

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

A. A. Ribicoff Federal Building
450 Main Street, 4th Floor
Hartford, Connecticut 06103-3503
Hours: 8:30 a.m. to 5 p.m.
860-240-3522.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3006.